(c) In repairing or reconstructing its aforementioned roadbed failed to inspect the materials used for said purpose and carelessly and negligently allowed and permitted a large clinker to be placed among loose cinders adjacent to the aforementioned tracks.

(d) It was otherwise careless and negligent in the premises and violated its established rules, customs and practices.

11 7. The allegations of paragraph 7 are denied.

8. The allegations of paragraph 8 are denied.

9. The allegations of paragraph 9 are denied.

10. For a further, separate and complete defense, defendant alleges that the injuries complained of resulted solely from plaintiff's negligence in that at the time and place alleged said plaintiff failed to exercise due care and caution for his own safety, which failure proximately caused or proximately contributed to cause his own injuries.

WHEREFORE, plaintiff is not entitled to judgment against the defendant in the amount of $30,000 plus costs and disbursements, or in any amount whatsoever, by reason of the allegations of the complaint as they are therein set forth.

ILLINOIS CENTRAL RAILROAD COMPANY.
By Herbert J. Deany,
Charles I. Hopkins, Jr.,
Its Attorneys.

135 East Eleventh Place
Chicago 5, Illinois
WAbash 2-4811

12 And afterwards on, to wit, the 11th day of April, 1955 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had On February 18, 21 and 23, 1955, Before The Honorable Philip L. Sullivan, Judge, in words and figures following, to wit:

17 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Divison
• • (Caption No. 53 C 1687) • •

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the Judges of said Court, and a jury, at Chicago, Illinois, commencing on February 18, 1955.

Appearances:

Mr. Robert J. Rafferty,
Appeared on behalf of the Plaintiff;
Mr. William F. Bunn,
Appeared on behalf of the Defendant.

18 (A jury was duly empaneled and sworn to try the cause. Jury voir dire not transcribed.)

(Thereupon the Jury heard the opening statements of counsel for the respective parties. Opening statements not transcribed.)

Thereupon the plaintiff, to maintain the issues on his part, offered and introduced the following evidence:

19 STIPULATION

Mr. Rafferty: We have stipuated and agreed that at the time and place of the accident in question both the plaintiff and the defendant were engaged in interstate commerce in transportation.

20 JOHN WEBB, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Court: Your name is John Webb?
The Witness: Yes, sir.
The Court: Where do you live?
The Witness: Clinton, Illinois?
The Court: Clinton?
The Witness: Yes.
The Court: What do you do?

The Witness: Railroader.
The Court: You are the plaintiff in the case, are you?
The Witness: Yes.
The Court: All right.

Direct Examination by Mr. Rafferty.

Q. Mr. Webb, how old a man are you?
A. 48.
Q. Will you speak up loud enough so these folks way back at the end of the jury box can hear you?
A. 48.
Q. Maybe if I sit back here you will talk louder. By whom are you employed, Mr. Webb?
A. Illinois Central Railroad.
21 Q. When did you first hire out to the Illinois Central Railroad?
A. In 1925.
Q. What type of job did you take on at that time?
A. I worked on the section.
Q. How long did you work as a section hand?
A. Up until 1927. I was laid off on account of reduction in force. Then I was taken back in 1928 and transferred from there to the paint gang.
Q. You were taken back in 1928 on the section gang?
A. Yes.
Q. And do you recall how long you worked on the section gang until you transferred to the painting division?
A. No, I don't.
Q. What were your duties as a section hand in your employment by the Illinois Central Railroad?
A. Well, we repaired track, laid track, put in new ties and new ballast.
Q. I believe about the year 1928 or 1929 you stated you were transferred to another department?
A. I went to the bridge and building department.
Q. How long did you stay in the bridge and building department?
A. Up until 1935.
22 Q. And in the year 1935, then what, if anything, did you do?
A. I hired out as a brakeman.
Q. Was that also with the Illinois Central?
A. Yes, sir.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11462

JOHN W. WEBB,

Plaintiff-Appellee,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

1 • • (Caption—Civil Action No. 53 C 1687) • •

Statement Pursuant to Rule 10(b) of
United States Court of Appeals
Seventh Circuit

Action commenced:	July 31, 1953.
Parties:	John W. Webb, Plaintiff; Illinois Central Railroad Company, Defendant.
Pleadings:	Complaint filed July 31, 1953; Answer filed August 26, 1953; Defendant's motion for judgment or in the alternative for a new trial filed March 4, 1955; Defendant's motion for judgment and motion for new trial denied March 14, 1955.
Trial:	Jury, before Honorable Phillip L. Sullivan; cause called to trial February 17, 1955 and continued to February 18, 1955; evidence heard on February 18 and 21, 1955, and concluded on February 23, 1955; verdict for plaintiff and damages in the sum of $15,000 rendered February 23, 1955.
Judgment:	Judgment on the verdict in the sum of $15,000 entered February 23, 1955.
Appeal:	Taken by filing Notice of Appeal April 7, 1955.

2 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States

Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of February (it being the 7th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 179th Year.

Present: Honorable John P. Barnes, District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal

Wednesday, February 23, 1955
Court met pursuant to adjournment
Present: Honorable Philip L. Sullivan, Trial Judge

3 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of March (it being the 7th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 179th Year.

Present: Honorable John P. Barnes, District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Cambell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal

Monday, March 14, 1955
Court met pursuant to adjournment
Present: Honorable Philip L. Sullivan, Trial Judge

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

4 • • (Caption—Civil Action No. 53 C 1687) • •

BE IT REMEMBERED, that on to wit, the 31st day of July, 1953, the above-entitled action was commenced by the filing of the Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—Civil Action No. 53 C 1687) • •

JURY DEMANDED

COMPLAINT

5 Now comes the plaintiff, John W. Webb, by Robert J. Rafferty, one of his attorneys, and for his cause of action against the defendant the Illinois Central Railroad Company, alleges and states:

1. Defendant is, and at all times herein mentioned, was a corporation duly organized and existing according to law, engaged and engaging in the business of owning and operating a line and system of railroads and railroad properties as a common carrier by railroad of goods and passengers for hire in interstate commerce and transportation in, through and between various of the several states of the United States, and doing business and having an office and principal place of business in the City of Chicago, County of Cook and State of Illinois.

2. Plaintiff, at all times herein mentioned and for some time prior thereto, was in the employment of the defendant as a flagman and employed by the defendant in its business of interstate commerce and transportation by railroad, and all or a substantial part of the duties of the plaintiff in such employment were in furtherance of interstate commerce and transportation, and directly, closely and substantially affected such commerce; that

6 plaintiff duties as such a flagman required him to work on or about the cars, tracks and premises of the defendant, and to do other work generally performed by a flagman.

3. That on to-wit July 2, 1952, at or about the hour of 11:05 a.m., while engaged in the course and scope of his employment on defendant's house track in or near Mount Olive, Illinois, plaintiff observed a car in one of defendant's train which was leaking grain, and it became and was the duty of the plaintiff to plug a hole in the bottom of a car from which said wheat was leaking.

4. That at said time and place defendant's house track ran in a general north and south direction and the cut of cars which contained the car leaking wheat as aforesaid included a caboose; that as plaintiff walked south on the east side of the aforementioned house track for the purpose of getting some waste material from the caboose to use in plugging up the leak in the aforementioned wheat car he stepped upon a large clinker which was imbedded in loose cinders and he was caused to lose his footing and to fall and injure his left knee.

5. That prior to the happening of the occurrence herein complained of, defendant, through its agents and servants, had made repairs in the roadbed and ground adjacent thereto and carelessly and negligently placed said large clinker among loose cinders, or carelessly and negligently allowed and permitted said large clinker to remain in said cinders.

6. That at said time and place the defendant was guilty of one or more of the following acts of negligence or unlawful conduct which directly and proximately caused, or directly and proximately contributed to cause, the accident in question and the plaintiff's injuries:

(a) Failed to use ordinary care to furnish the plaintiff with a reasonable safe place to work and to perform the duties of his employment,

(b) Placed a large clinker among the cinders constituting its roadbed and thereby created a hazardous condition for its employees working upon or about its aforementioned tracks.

(c) In repairing or reconstructing its aforementioned roadbed failed to inspect the materials used for said purpose and carelessly and negligently allowed and permitted a large clinker to be placed among loose cinders adjacent to the aforementioned tracks.

(d) It was otherwise careless and negligent in the premises and violated its established rules, customs and practices.

7. As a direct and proximate result of one or more of the foregoing acts of negligence and unlawful conduct, plaintiff was permanently and severely injured in the region of his left knee and was caused to suffer great bodily and mental pain; he was subsequently hospitalized and operated upon.

8. Prior to receiving said injuries plaintiff was in good health and was regularly employed by the defendant and was earning and was capable of earning large sums of money in the work in which he was engaged for the defendant; that as a result of the foregoing accident and injuries he has been permanently injured and he has lost large sums of money which he would otherwise have made and obtained and his earning capacity has been damaged and impaired.

9. THAT by reason of the facts herein alleged plaintiff has sustained damages at the hands of the defendant in the sum of Thirty Thousand ($30,000.00) Dollars.

10. WHEREFORE: Plaintiff demands judgment against the defendant in the amount of Thirty Thousand ($30,000.00) Dollars plus his costs and disbursements incurred herein and he demands trial by jury.

Robert J. Rafferty,
Attorney for Plaintiff.

30 N. LaSalle Street
Chicago 2, Illinois
RAndolph 6-1892

8 And afterwards on, to wit, the 26th day of August, 1953 came the defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 53 C 1687)

9 ANSWER

Now comes the defendant, ILLINOIS CENTRAL RAILROAD COMPANY, by its attorneys, and for answer to the complaint filed herein says:

1. The allegations of paragraph 1 are admitted.

Q. And did you work in any other line of work during any of this period of time from 1925 down to date except as a railroad man in the employment of the Illinois Central?

A. I do not understand.

Q. Did you ever do any other work during this period from 1925 down to date except work for the railroad?

A. Yes. When I was cut off on account of reduction in force, I worked on the farm.

Q. Now, Mr. Webb, what are the duties of a brakeman in the employ of the Illinois Central Railroad; what does your job require you to do?

A. Well, I set off and pick up cars at different stations, inspect the train for bad order cars en route between points, and throw switches, derails, couple and uncouple cars, and various other duties.

Q. Do your duties as brakeman require you to get on and off moving cars?

A. Yes.

23 Q. And do they also require you to go over the tops of moving cars?

A. At various times, yes.

Q. Did your duties as brakeman also require you to walk over and alongside the roadbed under all types of weather conditions and over all types of roadbed?

A. Yes, sir.

Q. Directing your attention, Mr. Webb, to the 2nd day of July, 1952, do you recall where you reported for work that day?

A. East St. Louis, Illinois.

Q. And how are the work designations made; do they assign you a train or number of a run, or what?

A. Yes, sir.

Q. Do you remember the run number?

A. No. 68.

Q. What was the destination of train No. 68 that day?

A. Clinton, Illinois.

Q. Do you recall who the members of the engine crew were that were assigned to that train?

A. Yes.

Q. Who were they?

A. Forrest Carlson was the engineer, and Elza Isaacs was fireman.

24 Q. Who were the members of the train crew?
A. Conductor, J. A. Thompson; head brakeman, C. J. Stevenson; and myself as flagman.
Q. And is the flagman also the same as the rear brakeman?
A. Yes.
Q. Now, in railroading, Mr. Webb, is the conductor the foreman or supervisor of the job?
A. Yes, sir.
Q. Do you recall what time your train left East St. Louis that morning?
A. No, I don't. I have no record. I don't keep the record of what time we leave.
Q. Did I ask you before what the destination of the train was?
A. Yes.
Q. Clinton?
A. Clinton.
Q. Did you have occasion that morning to make a stop in the Town of Mt. Olive, Illinois?
A. Yes, sir.
Q. And approximately how far from East St. Louis is that?
A. About 46 miles.
25 Q. Do you recall approximately what time your train arrived at Mt. Olive?
A. About 10:45 A.M.
Q. Now, Mr. Webb, in Mt. Olive, is it correct to state that the Illinois Central main line track runs in a generally north and south direction?
A. Yes, sir.
Q. And is there a track to the east of the main line track?
A. Yes, sir.
Q. What is that track known and called?
A. Passing track.
Q. How is the passing track connected with the Illinois Central main line track?
A. By a switch.
The Court: By a switch, you said?
The Witness: Yes.

By Mr. Rafferty:

Q. Then is there a crossover track that leads from track to track?

A. It is what they call a turnout; it is an extension of the passing track.

Q. Mr. Webb, to the south of the passing track, and for all practical purposes almost an extension of it,
26 is there a track known as the house track?

A. Yes, sir.

Q. What other tracks are there to the east of the passing track and the house track?

A. There is the L & N main line track.

Q. Is that track connected with the Illinois Central passing track in some way?

A. Yes, sir.

Q. Is that done by switches and connecting track between the two?

A. Also by crossover.

Q. Mr. Webb, where is the house track switch located?

A. At the extreme south end of the passing track.

Q. And also to the east of the Illinois Central main line track?

A. Yes, sir.

Q. Now, when your train got to Mt. Olive, Illinois, what work was required to be done, as you remember?

A. We had orders to pick up a car from the house track and spot it on the mill track; also pick up two cars from the L & N house track that went with us. I don't know the destination of those cars.

Q. Can you tell us what your duties were in connection with the various picking up and dropping off of the
27 cars? What did you do that day?

A. Well, I threw the switches, coupled and uncoupled the cars, and directed the head brakeman what to do, gave signals to the engineer, seen that the movement was properly and safely made.

Q. Will you tell us the last movement that was made before this accident involved in this lawsuit? What was the last movement the train made or any cars made that you remember?

A. We picked this car up behind the train off of the Illinois Central house track, pulled out of the house track,

and backed the train toward the main line. I cut off behind the first car behind the engine.

Q. Where was the engine located at that time? Was it on the main line track, or the passing track of the crossover track?

A. It was between the crossover, from the passing to the L & N., and the house track switch.

Q. When you stated you cut a car off, did you cut it off next to the engine, or the far end of the car, so it remained attached to the engine?

A. It remained attached to the engine.

Q. Where was the next car located behind the car from which the uncoupling had been made?

28 A. Well, the north end of the car that was left standing was setting about 200 feet south of the house track switch.

Q. Do you know what kind of a car that was?

A. A box car.

Q. Do you know whether it was a load or empty?

A. Loaded.

Q. Do you know what it was loaded with?

A. Wheat.

Q. What, if anything, unusual did you observe about that car?

A. I observed it was leaking grain.

Q. Have you had experience, Mr. Webb, as an employee of the railroad, on previous occasions with noticing cars that were damaged in transit or were leaking?

A. Yes, sir.

Q. What were your duties when you saw that?

A. Well, we always try to rectify the leak, I mean, stop it from leaking, by plugging it with something.

Q. On this particular occasion, what did you do or plan to do when you saw the car leaking grain?

A. Well, when I saw it leaking grain, I told the head brakeman to go ahead with the work, told him what to do, and to plug the car, to stop the leak.

Q. At that time where were you standing?

29 A. I was standing about 20 feet south of the house track switch.

Q. And what did you do at that time? Tell us in your own words how this accident happened.

A. After I had instructed the head brakeman to go ahead with the work, I turned the angle cocks between the two cars, the first two cars in the train, and pulled the pin that would uncouple the head car from the balance of the train, gave the engineer a go-ahead sign. I started to turn to go back to the caboose to get some waste to plug this hole with, when I stepped on a cinder, a clinker, and fell.

Q. Do you recall how many steps you took before you stepped on this cinder or clinker you refer to?

A. One.

Q. And what foot, if you know, came down on it?

A. The left foot.

Q. Had you seen this clinker before you made your step?

A. No, sir, I did not.

Q. Had you had occasion to look at the ground?

A. Yes, sir.

Q. Will you tell us what happened with reference to your body when you stepped on this object?

A. My foot turned, threw me off balance, and I fell with my left leg doubled under me.

Q. If you can, Mr. Webb, will you tell the Court and jury whether or not, when you say you were thrown, whether you were thrown toward the left or right or forward or backward? Tell us, if you will, how your weight went.

A. I just went down in a heap.

Q. With reference to your knee, tell us where the force, if any, was exerted.

A. It was right in the knee joint; all my weight was on my left leg.

Q. Did you have occasion then to look at the ground and see what, if anything, had caused you to loose your balance at that point?

A. Yes, sir.

Q. What, if anything, did you observe?

A. I saw this clinker.

Q. Tell the Court and jury, or demonstrate, if you can, the approximate size of this object.

A. It was about the size of my fist, I guess.

Q. Had that clinker been on top of the roadbed before you made this step you refer to?

31 A. I never noticed.

Q. Tell the Court and jury what the condition of the roadbed was with reference to the cinders and construction around there.

A. It was a little bit soft. You could leave your footprints in it when you walked.

Q. Where was this cinder then when you saw it?

A. It was laying right by my foot.

Q. Was it imbedded in the ground or out of the ground?

A. It was out of the ground.

Q. Pardon me?

A. It was out of the ground, partially out of the ground.

Q. How did your leg feel at that time, Mr. Webb?

A. Very painful.

Q. Are we talking about your left leg now?

A. Yes, sir.

Q. What did you do?

A. Well, I got up, and looked to see what I stepped on, you know, and picked up and cast it to one side. I went back to the caboose, got a piece of waste off the caboose, and went back and plugged the hole in this wheat car.

Q. Then what did you do, Mr. Webb?

32 A. I got on the caboose and remained there.

Q. And according to your best judgment, approximately about what time of the day was this accident?

A. About 11.05.

The Court: About what time?

The Witness: About 11:05 A. M.

By Mr. Rafferty:

Q. What did you do then after you plugged up the grain car, Mr. Webb?

A. I went back into the caboose.

The Court: You did what?

The Witness: I walked back and got in the caboose.

The Court: All right.

By Mr. Rafferty:

Q. Did you do any more work at Mt. Olive yourself?

A. No, sir.

Q. What was the next stop that train made after Mt. Olive?

A. Litchfield, Illinois.

Q. And approximately how far is Litchfield from Mt. Olive?

A. About 9 miles.

Q. From the standpoint of running time, what would that mean?

A. About 12 to 15 minutes.

Q. During the trip from Mt. Olive to Litchfield, Illinois, were any of the members of the train crew in the caboose with you?

A. The conductor.

Q. Did you report the accident to the conductor?

A. Yes, sir, immediately after it happened.

Q. What, if anything, did you do when you got to Litchfield, Illinois?

A. I went to see the company doctor.

Q. And who was he?

A. Dr. Siler.

The Court: Siler?

The Witness: Yes, sir.

The Court: S-i-l-e-r?

The Witness: Yes.

By Mr. Rafferty:

Q. What, if anything, did Dr. Siler do for you?

A. He examined my knee, is all.

Q. Did he give you any treatment?

A. No, sir.

Q. What did you do then?

A. He instructed me to go on to Clinton and go to the company doctor at Clinton.

Q. And how did you get from Litchfield to Clinton?

A. In the caboose.

Q. And from the standpoint of miles and running time, what was the distance and approximate time it took to get to Clinton?

A. 55 miles was the distanace, and the running time varied.

The Court: How long did it take this day?

The Witness: I don't know exactly. We left there, I expect, about 1:00 o'clock at Litchfield, and we arrived in Clinton somewhere around 7:00 o'clock.

By Mr. Rafferty:

Q. There was work done by the crew between Litchfield and Clinton?

A. Yes.

Q. Did you assist or help in that work?

A. No, sir.

Q. Where were you while the work was being done?

A. In the caboose.

Q. When you got to Clinton that evening, what did you do?

A. I got off the caboose and walked to the depot
35 and there I met Trainmaster Brink, and he took me to Dr. Sinow at Clinton.

The Court: Mr. Rafferty, is this witness, the doctor that is coming in, an attending physician?

Mr. Rafferty: No, he is not.

The Court: All right. Go ahead.

By Mr. Rafferty:

Q. During this period of time, Mr. Webb, had you made out any accident report form?

A. Yes, sir.

Q. And is that an official form required by the company?

A. Yes, sir.

Q. Now, when you saw Dr. Sinow that evening, what, if anything, did he do or prescribe for you?

A. He examined my knee, and took two X-rays of it.

Q. What, if anything, did you notice about the appearance of your knee at that time?

A. It was swollen.

Q. How did it feel?

A. Very painful.

Mr. Rafferty: Your Honor, Dr. Stotz is here. May I have permission to withdraw Mr. Webb temporarily?
36 The Court: All right. What doctor was that?

The Witness: At Clinton?

The Court: No, the one you just mentioned.

The Witness: Dr. Sinow.

The Court: He is at Clinton?

The Witness: Yes, sir.

The Court: All right. That is all for the time being.

(Witness temporarily withdrawn from the witness stand.)

37 DR. S. KENNETH STOTZ, called as a witness on behalf of the Plaintiff herein, being first duly sworn, was examined and testified as follows:

The Court: What is your name?
The Witness: Dr. S. Kenneth Stotz.
The Court: Where do you live, Doctor?
The Witness: 3946 North Tripp.
The Court: Where is your office?
The Witness: 20 North Wacker Drive.
The Court: All right.

Direct Examination by Mr. Rafferty:

Q. Doctor, are you licensed to practice as a physician and surgeon in the State of Illinois?
A. I am.
Q. When were you so licensed?
A. 1934.
Q. Of what school or schools are you a graduate?
A. Northwestern University.
Q. In what year, Doctor?
A. 1934.
Q. Where did you take your internship after that period of time?
38 A. Cook County Hospital, and Walther Memorial Hospital.
Q. Doctor, have you had occasion to specialize in any branch of your profession?
A. Yes, sir, I have.
Q. In what branch?
A. Industrial medicine and surgery.
Q. And what does that specialty involve, Doctor?
A. It involves the treatment of injured workmen.
Q. Doctor, at my request have you had occasion to examine the plaintiff in this case, Mr. John W. Webb?
A. Yes, I examined him.
Q. When was the date of your first examination, Doctor?
A. On September 3, 1952. I examined him again on November 11, 1954, and again yesterday.
Q. Also, I believe, on November 12, 1952, Doctor. Have you a copy of your report at that time?
A. September 3, 1952? That is all I have the records. There may be another occasion.

Q. There is one November 12, 1952.

A. November 12, 1952.

Q. Doctor, directing your attention to the 3rd day of September, 1952, will you tell the Court and jury what your objective examination of Mr. Webb disclosed at that time.

39 A. The examination of September 3, 1952, showed considerable atrophy of misuse of the quadriceps groups of muscles.

Q. What do you mean by atrophy, Doctor, and what are the quadriceps muscles?

A. The quadriceps muscles are the group of muscles on the anterior portion of the thigh, having the function of straightening out the knee, some attached to the knee cap.

Q. When you use the word "atrophy," what do you mean by that?

A. Shrinking up of the muscles; they are smaller in size.

Q. What, if anything else, did you objective examination disclose at that time?

A. Measurement of the circumference of the left knee at the patella showed 15¼ inches; on the right, 14¼ inches.

Q. Is the patella what we lay people know as the knee cap, Doctor?

A. That is right. The measurement means that the knee on the right was larger in circumference than on the left at that time.

Q. By the left, you mean, Doctor?

40 A. The left knee, yes, was larger than the right. At that time he lacked ten degrees of full extension and 20 degree from full flexion when compared to the opposite leg. X-ray at that time was negative.

Q. When you say "negative," Doctor, you mean no evidence of fracture, is that correct?

A. Yes, no evidence of bony pathology.

Q. Tell us if at the conclusion of your examination on September 3, 1952, you made any diagnosis of Mr. Webb's condition?

A. Yes. At that time I thought he had a severe sprain of the knee, with possibly derangement of the medial meniscus; other words, the cartilage on the inside of the knee.

Q. You again saw Mr. Webb at my request, Doctor, November 12, 1952, is that correct?

A. That is correct.

Q. And what did your objective examination of Mr. Webb disclose at that time, Doctor?

A. Examination on November 12th revealed a scar, a surgical scar, located over the medial aspect of the left knee. The scar was about four inches in length. The patient had normal range of flexion and extension of the knee, and the tests for stability were satisfactory.

41 Measurements of the legs at that time were as follows:

Left leg at the calf, 12 inches; right, 13⅜ inches.

At the patella, that is at the knee itself, left, 15¼ inches; right, 14⅜ inches.

Six inches above the patella or knee cap, left; 17½ inches; right, 18⅝ inches.

Q. What, if any, significance was there to those measurements, Doctor?

A. That there was atrophy of the calf and thigh, and swelling of the knee.

Q. And this was an examination which had followed an operation, had it not, Doctor?

A. That is correct.

Q. You were not the operating surgeon?

A. That is correct.

Mr. Rafferty: For your information, Doctor, counsel and I have agreed that the cartilage was removed in the operation. Is that correct, Mr. Bunn?

Mr. Bunn: That is right.

By Mr. Rafferty:

Q. Which you probably discovered.

A. That is right.

42 Q. Doctor, what, if any, diagnosis of his condition did you make at that time, and what, if any, recommendation did you make to Mr. Webb?

A. I thought at that time that he did have the cartilage removed, and that he was not sufficiently strong enough to return to heavy work; and I recommended about a month to six weeks more rest and treatment.

Q. Doctor, you have referred to the cartilage that you physicians call the medial meniscus. Tell the Court and

jury where it is located and what function it performs in the human anatomy.

A. In the knee joint there are two cartilages, and they are rather moon-shaped, or semi circular. There is one on the inside of the knee, and one on the outside of the knee. The thigh bone is divided into two parts, and the knee joints sort of rest a trifle on, one side of it rests on one of these cartilages, and the other side rests on the other. The cartilage itself is on the tibia bone, which is the shin bone, and the cartilage function is more or less a bearing, like a bearing in a crank shaft of an automobile. It is slightly resilient; it takes up a little shock; and it also is very smooth in its surface; and the thigh bone lies over these cartilages, normally.

43 Q. Now, Doctor, did you have occasion to see Mr. Webb at a future time at my request?

A. Yes, I did.

The Court: What date is he now talking about?

Mr. Rafferty: It would be on or about the 11th—

The Witness: November 11, 1954, was the next occasion I saw the patient.

By Mr. Rafferty:

Q. What, if anything, did your objective examination on that date disclose?

A. Examination of the left leg on that date showed the same surgical scar, located in the same place. There was crepitation on motion of both knees, palpated, but more pronounced in the left.

Q. What does that mean in plain language?

A. In plain language, sort of a crackling feeling the examiner gets when he touches a joint and he moves it.

Q. What does that mean, Doctor?

A. It usually means an irregularity in the joint. You can have some crepitation without any appreciable disease of the joint. The important thing is: is there more on one side or the other, or are they the same?

Q. Was there more on one side than the other?

A. Yes, there was more in the left.

44 Q. Of what significance was that before the cartilage had been removed in the left leg?

A. It suggests that the joint on the left is not as regular as the one on the opposite side. Pressure on the knee,

stretching the medial collateral ligament, causes the patient to complain of pain.

Mr. Bunn: I object.

The Court: Not what he complained of. That was your objection, I take it?

Mr. Bunn: I object to any discussion as to what pain the patient told him he had.

The Court: Don't testify to anything the patient told you; just what you observed.

By the Witness:

A. A slight, visible swelling, in the area of the prepatellar bursa.

By Mr. Rafferty:

Q. What is the bursa, Doctor?

A. The bursa is a sac just below the knee cap. Swelling of it sometimes called in layman's terms, housemaid's knee.

Q. What else did your objective examination disclose?

A. We measured the legs again. The right calf was 13⅛, the left calf, 13⅛; at the patellar level, the right was 14¼, the left, 14½; six inches above the patella, 17½ on the right, and 17¾ on the left.

Q. Of what significance was the difference in measurements at that time, Doctor?

A. There wasn't too much difference in the two legs at that time. We might say that might be within the error of test; but when you looked at the patient, you could see a definite visible atrophy in the medial aspect of the thigh.

Q. And is "atrophy" the expression you said before indicated a disuse condition, Doctor?

A. That is correct.

Q. What else did your objective examination disclose at that time?

A. At that time we took x-rays of both knees, and there were no pathological findings with the exception there is slightly less calcium about the bone in the left knee joint when compared to the right.

Q. Of what, if any, significance is that?

A. It is an atrophy condition, similar to the atrophy of the muscles; it is a loss of calcium from disuse.

Q. When was the next time you saw Mr. Webb, Doctor?

A. I saw him yesterday, and on that date the same scar I described before was present; definite visible

46 atrophy of the left thigh most noted in the medial and the anterior aspect. The patient appears to have full range of flexion and extension of the left knee. He walks with a slight limp and somewhat uncertain gait. Measurements of the legs are as follows:

Calf, 13¼ on the right; left, 13. She has made an error here in my report. I better take it from my original notes.

At the calf the right was 13⅛. I want to be sure I have got the right one. I mean, here it is.

On the examination yesterday, left calf, 13; right calf, 13¼; at the knee, 14⅜, left; right, 14⅛; six inches above the knee, 17¼, left; 17¾, right.

Q. Of what significance were those measurements, Doctor?

A. That is the same as previously. There is slight atrophy of the calf, a little more in the thigh, and slight swelling in the knee.

Q. And what was your diagnosis at the conclusion, Doctor, of your examination of Mr. Webb yesterday?

A. I felt that the patient had had a cartilage removal, and that there were some residuals from it.

The Court: What do you mean by that?

47 The Witness: There was a residual permanent disability.

By Mr. Rafferty:

Q. Doctor, assume a man 46 years of age, who on or about July 2, 1952, was employed as a railroad brakeman. While engaged in the course of his employment, he had occasion to step on a large clinker or cinder in a soft road bed, and was suddenly thrown from his balance, and felt a pain in his left knee. He was examined by a doctor within approximately half an hour thereafter; was examined by another doctor on the same evening. The second doctor referred to gave this man diathermy treatments to approximately July 17th, during which period of time he got about by the use of crutches. He was admitted to a hospital and given physiotherapy treatments until approximately July 28th. During all this period of time, Doctor, he complained of pain and swelling in his knee, and a feeling of instability of the left knee.

He was released from the hospital and returned to a treating physician, who placed his left knee in a cast for

a period from approximately August 4th to August 25th of the same year; and after the removal of the cast, diathermy treatments were given.

On or about September 13, 1952, an operation was performed wherein the medial meniscus in his left knee was
48 removed. On or about September 18 of the same year, a needle was inserted in the operative area, and fluid removed therefrom.

He returned to the care of the attending doctor, and was given physiotherapy treatment, and weights were attached to his left leg, which he was instructed to raise and lower to strengthen the muscles. He was instructed to use a hot water bottle and an electric pad on his left knee.

He was released for work by the attending physician on or about November 10, 1952.

He was examined on or about September 3, 1952, by a physician, whose objective examination disclosed considerable atrophy of disuse of the quadriceps group of muscles; and measurements made by the attending physician at that time showed that the left knee at the patella measured approximately 15¼ inches in circumference, whereas the right knee was approximately 14¼ inches; and at that time he lacked about ten degrees of full extension and twenty degrees of full flexion. X-rays were taken and were negative for fractures.

This man returned to work on or about December 10, 1952, and at that time observed a painful condition of his left knee, and found that upon using his leg that it
49 swelled up on him and caused him continuous pain, and at all times he had a feeling of insecurity and instability in the left leg.

He was examined again by a physician on or about November 11, 1954, who observed at that time that an operation had been performed, and a scar three to three and a half inches long was observed in the area of the left patella. At that time there was a slight visible swelling in the area of the pre-patellar bursa. That the measurement at the calf on the left leg was 13⅛, and the same on the right; but at the patella 14½ on the left and 14¼ on the right; and six inches above the knee, 17¾ on the right and 17½ on the left. At that time an X-ray film was taken and it was observed that there was less calcium about the bone on the left knee than on the right.

The man was again examined by a physician on or about November 11, 1954, who observed at that time crepitation in both knees when palpated, but more pronounced in the left; and a visible swelling in the area of the pre-patellar bursa.

He was examined again by a physician on or about February 17, 1955, at which time the following measurements were observed: at the calf, on the left, 13 inches, the
50 right, 13¼ inches; at the knee, 14⅜ inches on the left, and 14⅛ inches on the right; six inches above the knee, 17¼ inches on the left and 17¾ inches on the right, but that there was definite visible atrophy of the left leg. At that time the individual walked with an uncertain gait and a limp.

Do you have an opinion, Doctor, based upon a reasonable degree of medical certainly, as to whether or not there might be a casual relationship between the condition of illbeing as set forth in the hypothetical question, and the accident of July 2, 1952, referred to in the question?

A. Yes.

Mr. Bunn: I am going to object, your Honor, to all the assumptions in the hypothetical question, unless they will be proven up by Mr. Rafferty.

The Court: I assume that to be correct.

Mr. Rafferty: He is correct on that, your Honor. I will have to prove them up.

The Court: You say you have an opinion?

The Witness: Yes.

By Mr. Rafferty:

Q. What is your opinion?

51 A. I believe there could be a connection.

Q. Doctor, in your opinion, is there a casual relationship between the accident referred to, the treatment referred to in the hypothetical question, and the present complaint of the individual about instability in the left knee, continued pain in the left knee, and the swelling of the left knee upon use thereof?

A. Yes, I believe so.

Q. In your opinion, Doctor, is the condition of illbeing as set forth in the hypothetical question of temporary or permanent nature?

A. It is of a permanent nature.

Q. In your opinion, Doctor, is there any need of further medical attention or surgery?

A. I don't believe any further treatment is indicated.

Mr. Rafferty: Cross examine, Mr. Bunn.

Cross Examination by Mr. Bunn:

Q. Doctor, prior to the first visit that Mr. Webb made to your office, on or about September 3, 1952, you had never met Mr. Webb, had you?

A. No.

Q. He was never a patient of yours?

A. No.

52 Q. He was referred to you by Mr. Rafferty?

A. That is correct.

Q. For examination only, is that right?

A. That is correct.

Q. And on these four visits you gave him no treatment whatsoever?

A. That is correct.

Q. Now, I think you said, Doctor, on September 3, 1952, you found atrophy of disuse of the quadriceps muscles, is that correct?

A. That is correct.

Q. And this atrophy of disuse, that is a temporary wasting away, is it?

A. Not always.

Q. Not always?

A. Not always.

Q. It may be permanent if disuse is prolonged for a sufficient period of time?

A. Correct.

Q. When you saw Mr. Webb, was he out of the cast at that time?

A. Yes.

Q. But his leg had been in a cast, had it not?

A. Yes.

53 Q. And his leg being in a cast, it would be in an immobile position, is that right?

A. That is correct.

Q. And ordinarily, anytime the leg is immobilized, isn't that the reason for the atrophy that you find?

A. Anything that stops the muscles from being used, a cast or a splint, or disease, can cause atrophy. Even amputation, where you cut the leg off, say at the knee, the thigh muscles don't have to work the knee any more, so they atrophy.

Q. Once the limb is used again, why, in the normal course of events, say, in the vast majority of instances, the atrophy soon slowly disappears as the muscles regain their muscle tone, isn't that correct?

A. Usually. In some cases it does not.

Q. I think you also said on your September 3, 1952 examination of Mr. Webb, at that time he had a ten degree limitation of the extension of the left knee?

A. That is right.

Q. And a twenty per cent limitation of flexion, is that correct?

A. Yes.

Q. And you found no fractures?

A. No fractures, that is correct.

54 Q. The next time you examined Mr. Webb was about two months and a week or so later, is that correct?

A. On November 12, 1952, yes.

Q. I think you said at that time he had a normal range of extension and flexion, is that correct?

A. That is correct.

Q. In other words, by that you mean that he could bend his knee as far as a normal individual could, and could straighten his knee as far as a normal individual could?

A. At least as far as the other leg. That is the way you usually compare it, by comparing the opposite.

Q. And you found no injury to the other knee?

A. No.

Q. You also mentioned something else on the November 12, 1952 examination. Did you say that there was a satisfactory rotation, or what was the word you used?

A. The test for stability was satisfactory.

Q. The test for stability was satisfactory?

A. Yes. In other words, we tested for the two sets of ligaments to see whether they loosened up any.

Q. You found they were not loosened up?

A. As far as we could tell.

Q. Well, you considered them satisfactory, did you not, Doctor?

55 A. Found nothing that I could find wrong with them.

Q. On your examination of Mr. Webb on November 12, did you know that he had just recently left the Illinois Central Hospital?

A. Yes. My history shows that until October 8 he had been receiving physiotherapy treatment there. He was discharged on or about the 8th of October.

Q. Now, this crepitation on motion you said you found in both knees, is that correct?

A. That is correct.

Q. And you have given quite a few measurements. I was not able to catch them all. The measurement, for example, at the patella, on your examination of November 11, 14½ for the left, and 14¼ on the right?

Mr. Rafferty: That is November, 1954.

By Mr. Bunn:

Q. I am sorry. That was November of 1954.

A. 1954?

Q. Yes.

A. November 11th, the patella, 14¼ on the right, and 14½ on the left.

The Court: Tell the jury what the patella is.

The Witness: The patella is the knee cap, right in front of your knee, and that is the level you put a tape

56 measure around, the middle of the knee cap.

By Mr. Bunn:

Q. Let me ask you: a difference of that sort, wouldn't you find that in almost any individual who would have normal knees, without any derangement or any involvement in the limbs whatsoever; couldn't there conceivably be that much difference in the circumference in the limbs?

A. Yes, but coupled with what you can see—you can take your tape measure and change the measurements, if you do it wilfully, but if you try to be very careful, you should find the circumference within an eighth of an inch at that particular level. Measurements up here in the thigh or a little harder, because the tissues are softer. It is not the best way. Your eye tells you more, but your measurements show it more graphically.

Q. Wouldn't your measurements be more correct than what you could see with your eye?

A. Sometimes, and sometimes not. In this particular case I think anybody could see the thigh atrophy if they took a look at it.

Q. Could you see the difference of a quarter of an inch?

A. You could see where the measurements don't
57 show so much difference, the eye will show you much more, and you would expect to look at the leg to find more, because sometimes your atrophy is immobilized.

Q. This was at the patella region?

A. The patella region don't tell anything about atrophy.

Q. It is quite possible, for example, that the measurements of each one of your legs in the patella region may be a quarter of an inch off?

A. It is possible.

Q. Or mine, isn't that possible, Doctor?

A. That is possible.

Q. In other words, that is no great variation, is it?

A. No, it is not a great variation, but coupled with other findings and what you can see, it has significance.

Q. Now, again, in February—what was the date, the 17th—of this year?

A. Yes.

Q. You saw Mr. Webb again, and again you found these measurements that, by and large, a difference in the circumference of the calf and the knee, was about half an inch, would be about half an inch lesser in the left than in the right, is that right?

A. No, at the calf it is a quarter of an inch. At the
58 calf it is smaller in the left. The knee is larger at the patella and the thigh is smaller. That means essentially a little swelling at the knee, a little smaller in the thigh and calf.

Q. You never examined Mr. Webb before the occurrence he complains of in this suit?

A. No.

Q. So you don't know whether that is the normal finding or not?

A. All I know is what I saw in my examinations.

Q. You don't know whether that was his normal measurement before the injury?

A. I know it is not the normal measurement.

Q. I will ask you again, you don't know whether or not these measurements that you found were the same measurements that Mr. Webb had before July 2, 1952?

A. No, I don't know anything that happened before I first saw him.

Q. So they may be perfectly normal, may be the same measurements Mr. Webb had before the injury, is that correct?

A. They even varied in my various measurements, so we don't expect them to be the same from year to year. There is a variation.

59 Q. Ordinarilly, with the use of the limb, the atrophy would not be so noticeable, would it?

A. If the limb is used sufficiently and soon enough, you get practically a return to normal muscle size; but if the limb is not used for a long period of time, or if for some reason it is still not being used, the atrophy persists. When it persists for a certain length of time, then it may be permanent.

Q. You know generally what the duties of a railroad brakeman or flagman are?

A. I know a little.

Q. You do know a little?

A. Yes.

Q. You know it requires switching?

A. Yes.

Q. It requires getting up on and off of cars?

A. That is correct.

Q. It requires sometimes quite a bit of walking back and forth?

A. That is correct.

Q. Now, in the ordinary course of events, if a man continued—if he was off for say, four or five months, and went back on the job and continued working quite regularly, as up to the present, you would not expect to

60 find much atrophy in that time, would you?

A. I don't quite get your question.

Q. Well, you say there is still atrophy in the left thigh when you last saw him, the day before yesterday, is that true?

A. That is right.

Q. Although he had full range of extension and flexion, is that true?

A. That is right.

Q. You also found a difference in the calf and a difference in the knee, I think. Is that true?

A. That is right.

Q. And you say that this man was still suffering to some extent, this Mr. Webb was still suffering and had suffered some residual permanent disability, is that right?

A. That is right.

Q. Well now, ordinarilly, if a man, say he had a lay-off of four or five months, and one of his legs did not receive too much use during that period, but that he went back to work and did the work of a switchman for a period of about two years and two or three months, would you ordinarilly expect to see the atrophy pretty well diminished?

A. It would be pretty well diminished, if there was
61 nothing wrong with his leg.

Q. Well, you know the work of a brakeman, don't you?

A. Yes.

Q. In your opinion, wouldn't that be a fairly strenuous job and make fairly strenuous use of that leg?

A. That is correct.

Q. Mr. Rafferty in the hypothetical question that he propounded to you, asked you, and you answered that there was, in your opinion, some permanent disability still in that leg, is that correct?

A. Yes.

Q. As far as the hypothetical man was concerned?

A. Yes.

Q. Well, now, if you would add to that hypothetical question the additional facts, that the hypothetical man from, say, December of 1954, to the present, has worked coontinuously and has not missed one trip as a railroad brakeman or flagman, would you say that that man with reasonable probability would be able to continue to do railroad work?

Mr. Rafferty: I object. If counsel proposes to connect up the fact that at a later time Mr. Webb has missed no time from work since returning, I have no objection
62 to the modification of the hypothetical question.

Mr. Bunn: Just to this extent, your Honor, that I I don't think—if I did, I am sorry, but I don't think in the hypothetical question, the additional facts, that I made any reference to the fact that he had missed no time since he was working. I called attention to the time from December 4th until the present.

The Court: Restate your question.

By Mr. Bunn:

Q. Doctor Stotz, considering all the assumptions Mr. Rafferty made in propounding to you the hypothetical question, if you had the additional assumptions before you that this hypothetical man did the work of a railroad brakeman or flagman, had worked through December, 1954, January, 1955, and right up to the present, worked regularly, without missing one of his trips, wouldn't that indicate to you that he was capable of doing railroad work?

A. It would certainly indicate he was capable of doing his work, yes; but that has nothing to do with the findings I found in the knee.

Q. But you would say he is capable of doing the work, is that right?

63 A. If he has been doing it, it is probable that he is capable.

Q. Doctor Stotz, at any of these examinations you made of Mr. Webb, did you at any time consult with any of the members of the staff at the I. C. Hospital concerning what treatment they had given Mr. Webb?

A. No.

Q. What compensation do you expect for these examinotions and this testimony here in court today?

A. Well, I haven't given any thought to what the testimony will cost, but I do have the bills here, if you would like to see them.

Q. If you could just give them to me, Doctor.

The Court: You want the amounts and dates, I take it?

The Witness: The one I probably have missing, is the report of that one examination, but that will be a $10 examination. I don't have the bill for that one.

The Court: What is the total?

The Witness: I will have to add it up, sir.

The Court: All right.

The Witness: There are four reports, and two sets of x-rays. $60.00 or $70.00, somewhere in that neighbor-
64 hood; maybe a little more or less.

I don't have all the statements attached here.

By Mr. Bunn:

Q. What do you expect to charge for your testifying in court?

A. I usually charge $25 when I come up, if it doesn't take too much time.

Q. Have you sent out any bills yet to Mr. Webb?

A. No. I have sent a couple to Mr. Rafferty for the examinations.

Q. Have they been paid?

A. I think all the bills have been paid, as far as I know, except yesterday's report. I haven't sent any bill on that yet.

Mr. Bunn: That is all.

Redirect Examination by Mr. Rafferty:

Q. Doctor Stotz, if a man favored his leg because of pain in the knee, would you expect to find a condition of atrophy and disuse in that leg?

A. Yes.

Q. Mr. Bunn asked you, Doctor, whether or not you observed crepitation in both Mr. Webb's knees, and
65 I believe you stated you did.

A. Yes.

Q. Did you observe more in the left knee, which was the site of the operation, or more in the right?

A. More in the left. I mentioned that.

Q. Now, Doctor, Mr. Bunn inquired as to your charges for your examinations, your x-rays, and your reports, and for your compensation for coming to court. Are those the usual customary charges, Doctor, for services of that type rendered in this city?

A. That is right.

Q. Doctor, have you had occasion to testify in court before?

A. Yes, I have.

Q. Doctor, will you tell the Court and jury the approximate per cent of the times that you appear in court re-

presenting defendants as compared to the per cent of times you appear in court representing plaintiffs?

A. Probably more for defendants.

The Court: What?

The Witness: Probably more for the defendants. I don't come into court very often, probably once a month, once every two months,

Mr. Bunn: How often, Doctor?

66 The Witness: Once a month or once every two months.

By Mr. Rafferty:

Q. Doctor, are you not examining physician for the Lumbermen's Insurance Company?

A. That is correct.

Q. And represent that concern in the handling of their industrial accidents?

A. Yes, I do.

Mr. Rafferty: I believe that is all, Doctor.

Recross Examination by Mr. Bunn:

Q. Doctor, we have met before, haven't we, in court?

A. Yes, I believe the last time I was in court I met you, in the last case I was over here.

Mr. Bunn: No other questions, your Honor.

Redirect Examination by Mr. Rafferty:

Q. At the time you met Mr. Bunn, that was approximately a year and a quarter ago, was it not, Doctor?

A. Wasn't he in the one with Doctor Mason? I have him mixed up with another man.

Mr. Rafferty: That is all, Doctor.

67 (Witness Excused.)

The Court: The jurors will remember your instructions. You are excused now until 10:00 o'clock Monday morning.

(Whereupon an adjournment was taken to 10:00 o'clock a.m., Monday, February 21, 1955.)

68 • • (Caption No. 53 C 1687) • •

Before Judge Sullivan and a Jury, Monday, February 21, 1955, 10:00 o'clock a.m.

Court met pursuant to an adjournment.
Present:

Mr. Robert J. Rafferty,
Appeared on behalf of the Plaintiff;
Mr. William F. Bunn,
Appeared on behalf of the Defendant.

The Court: You may proceed.

Mr. Rafferty: Ladies and gentleman of the jury: We have agreed that on September 15, 1952, at the time of the operation on Mr. Webb in the Illinois Central Hospital, that it was observed that he had a torn cartilage in his left knee, that being the same knee that Doctor Stotz referred to, and because of the reason that the
69 cartilage was torn, the operating surgeon thought it necessary to remove it, and did remove it. Thank you.

JOHN WEBB, the plaintiff, having been theretofore duly sworn herein, resumed the stand and testified
70 further as follows:

Direct Examination by Mr. Rafferty:

Q. Mr. Webb, I believe at the time you were on the stand last, you were referring to an examination by Dr. Sinow in Clinton?

A. Yes, sir.

Q. When was the first time you saw Dr. Sinow in connection with this occurence?

A. On the evening of January 2, 1952.

Q. You mean July 2nd?

A. July the 2nd, pardon me.

Q. That was the same day as the accident?

A. Yes, sir.

Q. What did Dr. Sinow do for you or prescribe for you at that time, if anything?

A. He examined my knee and taken two X-rays of it, and told me to come back the next day.

Q. Now, the next day did you return to Dr. Sinow's office?

A. Yes sir.

71 What did he do for you at that time, Mr. Webb?

A. He gave me an electrical treatment on the knee.
Q. And do you recall how long Dr. Sinow continued the treatment of your knee?
A. I believe July the 17th.
Q. And what type of treatments were those during that period of time?
A. The same thing, electricity.
Q. How did you get around during that period of time?
A. On crutches.
Q. And who prescribed the crutches for you?
A. Dr. Sinow.
Q. Now, did you continue under Dr. Sinow's care after July 17th, or were you referred elsewhere?
A. I was referred to the Illinois Central Hospital, Chicago, Illinois.
Q. And did you come to the hospital?
A. Yes, sir.
Q. And approximately how long did you stay in the hospital, if you remember?
A. I believe July the 28th.
Q. And what was done for you in the way of care and treatment at the hospital?
A. Physiotherapy.
72 Q. What type of treatment is that?
A. Heat treatment.
Q. Now, on July 28th did you leave the Illinois Central Hospital?
A. Yes, sir.
Q. Did you have any instructions at that time with reference to additional medical care?
A. They referred me back to Dr. Sinow.
Q. When you returned to Dr. Sinow, what did he do for your left knee?
A. He put my left leg and knee in a cast.
Q. And do you recall the day he put the knee in the cast?
A. About August the 4th, I believe.
Q. Will you be good enough to tell the Court and jury the part of your leg that was enclosed in the cast, the area that was covered by the cast?
A. From the ankle to well above the knee.

Q. How long did your leg remain in the cast, Mr. Webb?

A. About three weeks, I believe.

Q. Would that be up to about August 25th, then?

A. Yes, sir.

Q. During that period of time, from the date the
73 cast was applied, on or about August 4th, to the date it was taken off, on or about August 25th, was any care given you for your leg, anything done for it, while the cast was on?

A. No, sir. there was nothing done other than I went back to Dr. Sinow to let him check the cast for looseness.

Q. How did your leg feel during this period of time?

A. Well, it was paining me a lot, and was sore.

Q. After the cast was removed, what, if anything, was done for your leg in the way of care or treatment?

A. Well, he gave me the same kind of treatment that he gave me before.

Q. And do you recall how long those treatments continued?

A. Up until September the 9th, I believe.

Q. And what, if anything, was done for you then, on September 9th?

A. He referred me back to the Illinois Central Hospital in Chicago.

Q. Do you recall approximately when you re-entered the Illinois Central Hospital?

A. I believe it was the 9th.

Q. And what, if anything, was done for you in
74 the hospital during that period of time?

A. They gave me physical examination of the knee, the day that I entered the hospital, and re-examined my knee, and that was all that was done that day.

The Court: A little louder, please.

The Witness: That was all that was done that day.

By Mr. Rafferty:

Q. During this period of time, after the cast was removed and up to the time you entered the Illinois Central Hospital, how did your knee feel at that time?

A. Still sore and stiff. It felt like it was going to lock on me. I couldn't straighten my leg all the way out, and could not bend it.

Q. How did you get around during that period of time?
A. On the cast.
Q. After the cast was removed, and before you went in the hospital, how did you get around then?
A. Well, just walked; I did not have no cane or anything.
Q. What day were you operated on, John, do you remember?
A. September the 13th.
Q. That would be 1952?
75 Yes.
Q. Do you know who performed the operation?
A. Dr. Guy.
Q. And what was done for you during your stay in the hospital there after the operation?
A. They aspirated the knee.
Q When you say aspirated, what do you mean by that, John?
A. Put a needle in above my kneecap.
The Court: Talk just a little louder, please.
The Witness: They put a needle in above my kneecap and withdrew some fluid out of it.
By Mr. Rafferty:
Q. Now, with reference to the fluid that you refer to, was any condition visible about your knee that told you you had fluid there?
A. Yes, it was swollen very much.
Q. Do you recall how long you remained in the Illinois Central Hospital after the operation?
A. I believe it was in November — no, October. I believe I was discharged in October.
Q. And what was done for you in the hospital in the way of care and treatment for the knee?
A. They gave me heat treatments on my knee,
76 and massage, and a whirlpool bath.
Q. Was any course of exercises prescribed for you?
A. Yes, sir. They exercised my leg with weights attached to my foot.
The Court: Who prescribed that?
The Witness: The doctor, I suppose.

The Court: Who was the doctor?
The Witness: Dr. Guy.
The Court: All right.
By Mr. Rafferty:
Q. How was the weight attached to your leg, John?
A. Well, it was a cable that ran through a pulley that was attached to my ankle, my foot, and run back beneath me on a table and up through another pulley, and down, with the weight on the other end of the cable.
Q. What did you do then?
A. I would work my leg back and forth like that (illustrating), lifting those weights.
Q. Now, after your discharge, which I believe you stated was some time in October, did you have occasion to return to the Hospital as a patient or did you return and stay home?
A. Yes, I returned for further observation every two weeks thereafter until I was released.
77 Q. How did you feel at the time you were released from the hospital; how did your knee feel?
A. It was still sore, weak, and it pained me some.
Q. What, if anything, did you observe with reference to the swelling of the knee?
A. It was still swollen a little bit.
Q. When did you return to work at the Illinois Central Railroad?
A. December 10, 1952.
Q. What type of job did you return to at that time?
A. Through freight service.
Q. Was that the job that you were holding down at the time of the injury and before it?
A. No, sir.
Q. For what reason did you return to the through freight service?
A. It was lighter work; there was less walking, less climbing, shorter hours.
Q. And when you returned to work, did you receive any help from the crew at the time you first returned?
A. Yes, sir, I did.
Q. What was the nature of the help, what kind of help?
A. They would throw the switches for these tracks I was supposed to throw, and when we would make a

78 stop where we had to inspect the train, the other members of the crew would do the work of inspecting the train; and if we had cars to set off or take on, they would do it.

Q. You have referred, Mr. Webb, to a condition of swelling and fluid in the knee. Can you tell the Court and jury how long that condition remained, how long you observed it? Do you recall how long the swelling remained in your knee that you could observe?

A. Well, I can observe it yet today.

Q. After the operation, when you were able to get about on your feet, what, if anything, did you notice with reference to the knee, how it felt, how it appeared?

A. Well, it was very weak, unstable. I could not go up and down stairs. It was very painful when I put my weight on it, when I would step up, and naturally I had to go up a step at a time.

Q. What, if anything, do you observe about the condition of it now, at the present time?

A. It is the same way.

The Court: What?

The Witness: It is the same way.

By Mr. Rafferty:

Q. I wonder if you would be good enough to pull
79 up your pants leg and indicate to the jury the area of the operation, and the length of the scar.

A. The scar runs from here to there (indicating).

Mr. Rafferty: Turn around, so his Honor can see it, too.

The Court: All right.

By Mr. Rafferty:

Q. John, do you recall your earnings in the course of your employment with the Illinois Central Railroad in the year 1950, the amount of them?

A. Well, it was around $5,000.

Q. In 1951, the year preceding the accident?

A. It was a little over $7,000, I believe.

Q. I show you your withholding slip for the year 1951, and ask you if that refreshes your recollection as to your earnings during the calendar year 1951?

A. Yes.

The Court: If you show them to counsel, he may agree on it.

Mr. Rafferty: May I have permission to read that to the jury?

The Court: That you have agreed on. If you are
80 going to introduce them in evidence, have them marked.

Mr. Rafferty: I did not plan to.

The Court: All right.

Mr. Rafferty: Mr. Webb's earnings in the calendar year 1951 in the railroad employment were $7,052.25;

In the calendar year 1952 his earnings were $3,645.93;

In the calendar year 1953 his earnings were $5,180.63;

And in the calendar year 1954 his earnings were $5,648.29.

By Mr. Rafferty:

Q. Mr. Webb, what type of a job were you holding down in the railroad employment in the year 1951, the year before this accident happened?

A. I was on a local most of the time.

The Court: A little louder, please.

The Witness: I was on the local freight most of the time.

By Mr. Rafferty:

Q. And in the year 1952, up to the time of the accident, what type of service were you in?

A. Mostly local.

81 And in the year 1953, after you returned to work, what type of service did you go into?

A. Through freight.

Q. And in the year 1954, what type of service were you in?

A. Through freight.

Q. What is the difference, Mr. Webb, between the type of job you held before the accident and the type of job you held after the accident up to this time?

A. The type of job that I held before the accident, the local job you mean?

Q. Yes.

A. Well, it meant more money for one thing.

Q. And from the standpoint of physical work required, what was the difference?

A. It was a lot harder work; longer hours; there was quite a bit of overtime involved on the local.

Q. Does your seniority entitle you to work a job on the local freight at the present time?

A. Yes, sir.

Q. Why, then, are you working on other types of jobs, Mr. Webb?

A. Well, it is an easier job; it is not as long hours; not on duty as long; have a longer layover, rest
82 period. It is easier work, not nearly as much walking, not as much of switching.

Q. Mr. Webb, have there been any increase in compensation of brakemen since July of 1952 to the present time?

A. July of 1952?

Q. Yes.

A. Yes, there have been.

Q. Do you recall the amounts of the increases and when they were made, Mr. Webb?

A. Well, I don't just exactly know. I was getting $11.06 per day, I believe, in July. At the present date it pays $12.82.

Mr. Rafferty: Mark this Plaintiff's Exhibit 1 for identification.

(Whereupon said document was marked for identification Plaintiff's Exhibit 1.)

By Mr. Rafferty:

Q. Mr. Webb, I show you Plaintiff's Exhibit 1 for identification, and ask you if that is a schedule of the pay increases for brakemen that has been prepared by you from your records, showing the rates of pay and rates of increases?

A. Yes, sir, it is.

83 Q. Tell the Court and jury, Mr. Webb, the pay scale as of July 1952 in a regular freight and the increases in that type of service since that time, July, 1952.

A. Regular freight paid $12.55 per day.

Q. Tell us the increase after that then.

A. October 1952, it paid $12.71 per day.

The Court: Well, again, if you show it to counsel, he may agree on it and you may read it instead of having him read it.

Mr. Bunn: Except, it should be subject to cross-examination before it is admitted. I have never seen this be-

fore, so I could not verify the correctness of it.

The Court: All right, go ahead.

By the Witness:

A. (Continuing) January, 1953, regular freight paid $12.61;

April, 1953, $12.57;

July 31, 1953, $12.71;

October, 1953, $12.95;

December 1, 1953, $13.35 per day.

By Mr. Rafferty:

Q. Now, on the local freight service, what was the rate of compensation in July 1952, and what if any increases have there been since that time?

84

A. July, 1952, local freight paid $13.02 per day;

October, 1952, $13.18 per day;

January, 1953, $13.10 per day;

April, 1953, $13.04 per day;

July, 1953, $13.18 per day;

October, 1953, $13.42 per day;

December 1, 1953, $13.82 per day.

Q. Now, John, preceding the happening of this accident, did you have any occasion in any previous year to have a physical examination of your person by the company?

A. Yes, sir.

Q. When was that examination made, if you recall?

A. 1950 I was passed in physical examination.

Q. What was the condition of your left knee and left leg at that time?

A. O. K.

Q. And on July 2, 1952, before the accident happened, what was the condition of your left leg and left knee?

A. It was still all right.

Q. John, getting back to the happening of the accident itself, I am not sure if I brought it out or not, but did you have occasion to look down before you took this step, at which time you had the accident — did you have occasion to look at the ground?

85

A. Yes, sir.

Q. What, if anything, did you see then?

A. It was level, looked like good footing, outside of being a little loose.

Q. After the accident happened, did you have occasion to look down at the ground?

A. Yes, sir.

Q. And what, if anything, did you see then?

A. I saw a large clinker laying there.

Mr. Bunn: This has already been gone into.

The Court: I think you have covered that.

By Mr. Rafferty:

Q. John, did you have any occasion at that time to see where the clinker had been?

A. Yes, sir. There was a hole right by the side of the clinker.

Q. Now, John, based on your knowledge and experience as a section hand in the employment of the railroad, and based on your observation as a brakeman and switchman since that period of time, will you tell the Court and jury whether it is the custom and practice to use clinkers approximately the size of a man's fist in a railroad
86 roadbed?

A. No, sir.

Q. Why not, Mr. Webb?

A. Well, it doesn't pack down; it doesn't give good footing; and it cannot be tamped in under the ties for support.

Q. Did you know that the clinker that you have referred to was at this location before you stepped on it?

A. No, sir.

Q. Will you tell the Court and jury what you did with it after the accident happened?

A. I picked it up and cast it across the L & N track, off of the right-of-way.

Q. For what reason did you do that?

A. I threw it away to keep from somebody else stepping on it and maybe being injured. I done it as a safety precaution.

Mr. Rafferty: You may cross-examine, counsel.

Cross Examination by Mr. Bunn:

Mr. Rafferty: No objection, if you want to offer it.

Mr. Bunn: I would like to point out, ladies and
87 gentleman, that Mr. Rafferty and myself have stipulated and agreed that this photograph, which will be

marked Defendant's Exhibit 1, substantially represents the conditions around the house track switch here on or about July 15, 1952.

The Court: Was that admitted without objection?

Mr. Rafferty: Yes. No objection, your Honor.

(Said photograph, so offered and received in evidence, was marked Defendant's Exhibit 1.)

By Mr. Bunn:

Q. Mr. Webb, on July 2, 1952, I think you have already stated you were working at that time as a brakeman, is that correct?

A. Yes, sir.

Q. A flagman, brakeman?

A. Yes, sir.

Q. You were working the rear end of the train?

A. Yes, sir.

Q. And your train went from Clinton to East St. Louis and returned to Clinton, is that right?

A. It came from East St. Louis, went on the way 88 to Clinton.

Q. And then it returned to East St. Louis?

A. That would be the next day.

Q. Now, you mentioned that during the year of 1952 you were working mostly on the local freight run, is that right?

A. Yes, most of it.

Q. And that is the same run that you were on, on July 2, 1952?

A. The same run.

Q. Now, there are other runs, are there not, out of Clinton, for example, you have the passenger run, do you not?

A. Well, I am subject to call for extra passenger service, yes, sir.

Q. And you also have the through freight run that you have been working on since this occurrence, isn't that true?

A. Yes, sir.

Q. And you have other local runs, do you not, down in your district?

A. Yes, sir.

Q. And what other local runs do you have?

A. I have a job that works opposite to the one that
89 I was on.

Q. How do you designate that run?

A. Well, the run I was on originated at East St. Louis on Monday morning.

Q. The trains just more or less meet each other, is that right?

A. Yes. My layover was on Saturday, layover was in St. Louis; and on the opposite job Saturday layover was in Clinton.

Q. Now, in addition to that, you have what is also designated down there as the Mt. Pulaski local, don't you?

A. Yes, sir.

Q. Now, what other positions were you working on of these runs now we have already discussed; what other positions were you working in the year of 1952?

A. I don't just understand your question.

Q. Well, let me see if I can restate it. You said during the year 1952 you were working mostly on the local freight run, is that correct?

A. Yes.

Q. Now, you were working on other jobs in addition; it was not wholly local freight runs before this occurence in 1952?

90 A. Well, I acted as conductor I think a few times on the local.

Q. I see. Did you ever work on the through freight?

A. I was on through freight for a while.

Q. What position did you hold on the through freight?

A. I believe I was flagman most of the time.

Q. And that is the position that you have been in since the occurrence most of the time, is it not?

A. Yes, sir.

Q. Now, you have worked on the passenger run, have you not, before July of 1952?

A. Yes, sir.

Q. What positions have you held in the passenger run?

A. I was flagman, and also baggage man. Whichever job they called me for would be the position that I filled.

Q. Now, down in your territory, you work according to the seniority that you have. Doesn't the seniority that

you have determine the jobs that you can bid on and take from day to day?

A. Yes, sir.

Q. And if you are a young man, usually you don't have such a good choice, but as your seniority accumulates the choices become better, do they not?

91 A. Yes, in some cases, in the sense of the word that you can take whatever job that you are old enough to take. It may not be a better job. It might be a better job sometimes.

Q. But the choice is left up to you, if you have seniority, to bid, say, any one of one, two or three possible positions open during the day. If you have enough seniority, there are times when you can take any of the jobs you want to, are there not?

A. Well, there are conditions attached to that. We have rulings down there, the Brotherhood of Railway Trainmen rulings, that prohibit you from exercising your seniority only on certain positions.

Q. I see. Well, you worked on the passenger end of it during 1952, didn't you?

A. I don't recall if I was on passenger in 1952 or not. I would have to refer to my time book.

Q. All right. Then you worked on the through freight before July of 1952, didn't you?

A. Yes, sir.

Q. Now, on July 2, 1952, you were working as a brakeman, is that correct?

A. Brakeman-flagman, brakeman.

Q. And a brakeman works under the conductor,

92 is that right?

A. Yes, the conductor is the supervising officer.

Q. Now, the conductor, as I understand it, has considerably less physical work to do, is that right?

A. Yes, sir.

Q. And from January to July of 1952, you had often acted as conductor on the local, had you not?

A. I believe a few times. I could not say just how many. I would have to refer to the record of my time.

Q. And at other times before July 2, 1952, you would switch over to the through freight run and work that for a while?

A. Yes, sir.

Q. Now, conductor's pay, for example, is better than that of a brakeman on any given run, isn't it?

A. Yes, sir.

Q. So that, when a conductor's opening would appear, you would, as probably all of us would do, you would take the conductor's position?

A. No, sir. I never had that much seniority.

Q. You did not in 1952?

A. No, sir. I still haven't got it.

Q. But when the opening did present itself, you would ordinarily take it, wouldn't you?

93 A. If I stood for the job, what I mean, if the seniority entitled me to be called for the job, I would either go on it or lay off.

Q. And by the same token, if you have a great deal of seniority, if there is a good job available, and not quite so good a job available, you don't necessarily have to take the best job, do you?

A. No, sir, you do not.

Q. You can take the lesser of the two jobs; in other words, it is left up to your preference?

A. Yes, sir, it is up to you whether you want the job or not.

Q. You have been a promoted conductor since 1941, have you not?

A. 1941; yes, sir.

Q. But that does not necessarily mean you work all the time as a conductor, does it?

A. No, sir.

Q. But you do some work as a conductor?

A. Some.

Q. And I doubt if there is anyone that right now knows exactly when he will be due for any work as a conductor, is there?

A. No, sir.

94 Q. There are a lot of factors to consider?

A. Yes, there are.

Q. Business conditions?

A. Yes.

Q. That may affect it, may it not?

A. Yes.

Q. And the fact that men may retire earlier, or they may pass on sooner, or they may resign — all of those factors enter into it?

A. Yes, sir.

Q. But at this time you have about close to what — thirty years seniority, is that correct?

A. Well, as a brakeman, no, I haven't.

Q. How much seniority have you?

A. I have about nineteen years.

Q. Nineteen years seniority as a brakeman?

A. Since 1935.

Q. Now, from the time that you returned to work in December of 1952, Mr. Webb, until at least on or about November 4, 1954, your leg had never gone out from under you, had it?

A. No, sir.

Q. You have never had to leave the job before you completed your required number of hours because of
95 the pain in your leg, have you?

A. No, sir.

Q. Now, when you returned to work in December of 1952, you returned to what, through freight work?

A. Through freight service, yes.

Q. And you did not miss any one of your regularly scheduled trips all during the month of December, did you?

A. No, sir, I did not.

Q. December is ordinarily a pretty bad month, is it not?

A. Yes, sir.

Q. And on the job as a brakeman on the through freight, you still do have to do a certain amount of physical work, don't you?

A. Sir?

Q. I say, on a job as a brakeman on the through freight from East St. Louis to Clinton and return to East St. Louis, you still are required to do a certain amount of physical work?

A. Yes.

Q. You still have to do a certain amount of switching?

A Yes.

Q. You still have to do a certain amount of walk-
96 ing, don't you?

A. Yes, sir.

Q. You still have to do a certain amount of coupling and uncoupling of cars, don't you?

A. At times, yes.

Q. And get on and off of moving cars?

A. Yes, sir.

Q. Of course, the amount of those various items I just referred to, the amount of switching, etc., getting on and off cars and all that, that is not quite as strenuous as on the local freight, is that right?

A. It is just as strenuous, but there is not as much of it.

Q. I see. Just as strenuous?

A. Yes, sir.

Q. Now, in the year 1951, Mr. Webb, do you know offhand about how many trips you missed during the year?

A. I would have to refer to my time book.

Q. Do you have any idea at all? Was it ten a year?

A. I don't believe it was.

Q. You don't think it was ten?

A. No.

Q. It is something less than ten then?

A. Yes, I doubt if I missed over three or four
97 trips.

Q. Three or four trips over the entire year?

A. Yes. As I said, I would have to refer to my time book.

Q. I understand you may not remember exactly. I just wanted your best idea. Now, you did not work at all until you returned to work on December 9th or 10th, is that correct?

A. Yes, sir.

Q. And then you missed no trips during December of 1952?

A. No, sir.

Q. Now, during the year 1953, approximately how many trips did you miss?

A. I would still have to refer to my time book.

Q. Refer to your what?

A. To my time records.

Q. Well, about two months ago didn't you have somebody from the I. C. compile that information for you?

A. Yes, sir.

Q. And you don't remember now what you missed in 1953?

A. No, I don't remember what the amount of it was.

Q. Now, what about 1954, Mr. Webb? How many trips did you miss in 1954?

98 A. I still would have to refer to my time book. I could not tell offhand.

Q. Well, can we assume that you missed no trips?

A. In 1954?

Q. Yes.

A. I was off —

The Court: You were what?

The Witness: I laid off a couple of times.

By Mr. Bunn:

Q. A couple of times in 1954?

A. Yes, sir.

Q. In 1951 you laid off three or four times, you think?

A. I expect, yes.

Q. And how many times have you laid off in 1955 up until the time you came up for this lawsuit?

A. I think about three or four times.

Q. You have missed three or four trips from the beginning of this year up to — and I am not including now the time you took off to come up to this lawsuit — do you think you missed three or four trips in that period?

A. Well, I have stood for a couple of jobs that went out that I could have went out on while I was lying off.

Q. You think you missed three or four trips?

99 A. Yes, I think so.

Q. Did you miss them in January or this month?

A. I believe it was this month.

Q. You missed three or four trips in February, 1955?

A. I believe I laid off a couple of times in February.

Q. I am not trying to confuse you.

Mr. Rafferty: Let him finish.

Mr. Bunn: All right.

By the Witness:

A. (Continuing) I think I laid off the 15th of January.

I don't believe I laid off any more then until the first period of February.

By Mr. Bunn:

Q. And how many trips did you miss this month?

A. Well, as I said, there was two jobs went out I could have went out on if I had not laid off.

Q. Well, did you miss two trips, then, in February?

A. If you mean on my regular job, two trips on my own job that I am holding now?

Q. I am not concerned particularly whether you worked on one job one day and another job the next day. I am concerned with whether or not you stayed off and missed some trips when ordinarily you would have worked

100 during that period of time.

A. Yes, I did. I missed, as I said before, I missed two jobs that I could have went out on. The younger men in seniority than I was went out on the jobs.

Q. Now, since you returned to work in December of 1952, you have worked quite a few times on the Mt. Pulaski local, haven't you?

A. Yes, sir.

Q. As a conductor?

A. I think maybe a couple of times as conductor.

Q. And as a brakeman?

A. Yes. I believe I have made about eight or ten days as a brakeman.

Q. And the Mt. Pulaski local, as I understand, has three brakemen instead of two, isn't that right?

A. Yes.

Q. But it is local work that requires a good deal of switching, does it not?

A. Yes, sir.

Q. And do yuo recall when you did that work, Mr. Webb?

A. The latter part of December, 1954 I was on it.

Q. Do you recall a period about a month, running roughly from about June 18th to about July 10th, 1954, when you were working either as a brakeman or conductor on the Mt. Pulaski local?

101 A. Yes. I don't just recall the dates, but I was on there a few trips.

Q. That was a period of about a month, was it not?
A. No.
Mr. Rafferty: According to your calculation, three weeks.
By Mr. Bunn:
Q. Three weeks?
A. No, sir, it was not. It was just a few trips.
Q. Now, do you recall, on November 4th I believe it was, 1954, you came up to Chicago? I think that is the first time we met, in November 1954, in Mr. Rafferty's office.
A. Yes.
Q. And you missed a trip that day, did you not?
A. I don't know if I did or not. I don't know. I suppose I did.
Q. And on or about November 11th or 13th, or whenever it was, that you saw Dr. Stotz up here, you would miss a trip?
A. Yes, sir, I believe I did.
Q. And you missed, of course, your trips here in the proceedings in this lawsuit, is that right?
A. Yes.
102 Now, from December 9th or 10th of 1952, until November 4, 1954, you had not tried, had you, at that time you had not even tried to take your old job on the local freight?
A. No, sir.
Q. And then in the latter part of December, 1954, you took your old job, did you not, for about a week?
A. When?
Q. In about the latter part of December of 1954.
A. No, sir.
Q. You did not?
A. No, sir.
Q. You have not done any work at all then on your old East St. Louis-Clinton run?
A. Just as a conductor.
Q. You have never tried to do it as a brakeman?
A. No, sir.
Q. And on the through freight run that you spoke about, how many days a week did you work?

A. Well, that would be according to how many times you got called out, how many days it would be. You count so many trips.

Q. The work has been pretty regular on the through freight?

103 A. At times. And at times it is working pretty good, and at other times you don't go so often. Sometimes you get four trips in every two weeks, sometimes you get six.

Q. And you find it often, do you not, that you work even seven days a week?

A. No.

Q. No?

A. No, sir.

Q. Did you ever work seven days a week?

A. Yes — well, seven day a week — yes; in through freight, yes.

Q. And that is the job that you are on at the present?

A. Yes, sir. That would be where you work every day.

Q. Now, at any time that you feel in the future, any time that you feel that you want to take your old job, it is open to you, is it not?

A. Yes, sir, as long as my seniority entitles me to hold the job.

Q. Well, your seniority entitles you to hold the job at the present, doesn't it?

A. Yes.

Q. The moment you return to Clinton you can bid on that job, can't you, on your old job?

104 A. Yes, if there is nobody older in seniority than I am on it, I can.

Q. Since you returned to work in December, 1952, have you taken any passenger jobs?

A. Yes, I worked the passenger when they called me for it. You see, in my layover at Clinton, after the expiration of eight hours, I am subject to a call as brakeman on my job, a passenger flagman, a passenger baggage man, or a conductor, extra conductor.

Q. As those jobs come up, you can either take them or leave them?

A. If my seniority entitles me to, I can take them or leave them.

Q. Now, isn't it a fact, Mr. Webb, that on the local freight as compared to the through freight job, you have more out-of-pocket expenses on the local freight work?

A. Yes.

Q. Do you have any idea about how much a month that would be?

A. No, I would not. I would say it costs you about at least a dollar to a dollar and a half more per trip.

Q. That would offset to some extent, would it not,
105 the overtime you would be able to make on the local freight, isn't that correct, to that extent at least?

A. A little, yes.

Q. Now, these figures that are shown here on Plaintiff's Exhibit 1 for identification, where did they come from, Mr. Webb?

A. Well, sir, I got those from the secretary of the lodge I believe, Lodge 41.

Q. The secretary of the lodge of your brotherhood?

A. Yes, sir, Clinton, Illinois Lodge 41. I believe I got this stuff from him.

Q. You believe, or you know?

A. Now, I believe he is the one that furnished me that.

The Court: That is where they came from anyway, is that right?

The Witness: Yes, it came from the Brotherhood of Railway Trainmen records.

By Mr. Bunn:

Q. And those are not railroad records, are they?

A. Oh, no, sir.

Q. According to that record, there is about, roughly, 50 cents a day difference per hundred miles on the local as against the work you are doing, is that right?

A. About 46 cents, I believe.

106 Mr. Bunn: I don't know whether these are correct or not. At present I have no way of verifying them. I do not have anything like this in my file, myself.

The Court: I will reserve my ruling on it until you have a chance to check it.

Mr. Bunn: All right, thank you, Judge.

By Mr. Bunn:

Q. The pay that you make, Mr. Webb, is going to depend a lot on whether you stay on any certain run or not, is it not?

A. Yes, it would depend on that; also how often I work.

Q. That is right. At the time of the accident you were working on the local freight?

A. Yes, sir.

Q. But in the past you had taken for a while other runs, had you not?

A. Yes, sir.

Q. And since that you have taken other runs, have you not?

A. Yes. I have taken chain gang, and I was on this Mt. Pulaski local.

Q. And passenger?

107 A. I went out when they called me. I did not have enough seniority to take a passenger, but I went when they called me for it.

Q. And you have taken every job but the one that you were on at the time you were hurt, is that right?

A. Yes, sir. In one sense of the word, I did not take this Mt. Pulaski local. I marked up in another man's temporary vacancy.

Q. Well, that was your choice, wasn't it? You did not have to take it, did you?

A. Oh, no, I did not have to take it.

Q. That was your choice, to take it?

A. Yes, sir.

Q. Now, speaking of July 2, 1952, the weather was clear that day, was it not, at least about 10:45 or 11:00 o'clock?

A. Practically clear, I would say, yes.

Q. And shortly thereafter it was raining, I think?

A. I judge maybe thirty minutes to an hour afterwards it rained.

Q. And about how long had you worked on and off on this East St. Louis-Clinton run prior to July of 1952?

A. Since I hired out as a brakeman in 1935.

Q. That was about seventeen years?

A. Yes, sir.

Q. That runs from East St. Louis to Clinton and return?

A. It does now, but in former years it did not. It used to tie up at Springfield.

Q. Now, in that length of track that you would go back and forth over prior to 1952, what type of ballast would you find making up the roadbed?

A. In the seventeen years that I was — since I started braking?

Q. Yes, sir.

A. Well, you could run onto most any kind of a roadbed. It would be cinders, it could be chat.

Q. Chat is crushed stone, is that right?

A. There is real fine crushed stone, and there would be strips of tracks that would have rock ballast, maybe a half inch to an inch in size, some ballast that would have run bigger than that.

Q. And for about how long prior to July of 1952 had you been making stops on the local freight run that you were on at that time, how long had you been making stops at the Mt. Olive house track switch to make pickups from the house track?

A. Practically every day that I was on the local — 109 no. Lots of days we did not pick up from the house track.

Q. About how often would you pick up cars from the house track?

A. Well, at that time we was hauling way freight and in box cars. That is local way freight they unloaded at different stations. Most of the time we had set this car out at Mt. Olive.

Q. You would leave the car there?

A. Leave it there, and let the agent and the truck man unload it from the house track. On days that we had this car, we would leave it there; and maybe if we did not have one, the opposite local dropped one there, then we would go in and pick it up and take it to Litchfield, Illinois. Maybe if it would be empty, we would take it on and use it for something else.

Q. Would it be a fair statement to make, then, that practically every day you did pass over the house track switch?

A. Yes, if we had work to do there, we had to pass over the house track switch.

Q. Well, you had work there almost every day, didn't you, Mr. Webb?

A. Yes, practically every day, I would say, we
110 picked off cars off the L & N and delivered cars to the L & N and we went in and out of the siding and any time you went into the siding, you had to pass the house track switch.

Q. And it was one of your duties to throw the house track switch, was it?

A. If I was in position to throw it, yes, when we was using the house track switch, yes?

Q. Well, you were familiar with the footing conditions, were you, around the house track switch at Mt. Olive?

A. Yes.

Q. And there were no depressions to speak of, were there?

A. I never noticed any.

Q. And the ground was fairly level, was it not?

A. Yes, sir.

Q. In fact, the picture here substantially represents the conditions as they existed, does it not?

A. Yes, it does. It is the same locality, it looks to me like.

Q. Now, Mr. Webb, in the photograph here the photographer was looking north, was he not, generally north?

A. Yes, in a general direction, yes.

111 Q. And this is the house track switch, is it not?

A. Yes, sir.

Q. And at the time of the occurrence in question you were, I think you said, about 15 or 20 feet south of the house track switch, is that right?

A. Yes.

Q. And at the point that you slipped, about how far east — east is looking in this direction, is it not?

A. Yes.

Q. About how far east of the ties were you at that point?

A. About a foot east.

Q. Will you just take this pen and mark an X approximately where you were?

(Witness marks photograph.)

Q. Now, in all of the years prior to July 2nd of 1952 that you have been working in that area, you had never noticed any large clinkers there, had you?

A. Right at the spot that I was standing, you mean?

Q. Well, in that area.

A. Yes, that area, in that area.

Q. You had noticed them?

A. Yes.

Q. What did you do when you found them?

A. I did not do anything, sir. They was out of the 112 way so I would not walk on them.

Q. If you saw them, would you pick them up and throw them outside?

A. Once in a while. It was the only place there for the fireman to clean his fire box there at Mr. Olive, and I have seen clinkers laying around different places.

Q. Now, let me see if I get this correctly from you. You say — correct me if I am wrong — that on your trips prior to July 2, 1952, you say you did notice large cinders near the house track switch?

A. How long before did you say?

Q. Prior to July 2, 1952.

A. Yes.

Mr. Rafferty: What page?

Mr. Bunn: 26.

By Mr. Bunn:

Q. Calling your attention to on or about November 4, 1954, do you recall coming up here to Chicago, and that is the first time we met? Is that correct?

A. Yes.

Q. We met in Mr. Rafferty's office, is that correct?

A. Yes.

Q. At that time you were placed on your oath and 113 asked certain questions, and you gave certain answers, is that correct?

A. Yes, sir.

Q. There was a reporter there that was taking down everything that you said in answer to the questions, is that correct?

A. Yes, sir.

Q. Well, now, do you recall, Mr. Webb, this question being asked and this answer being given:

"Q. Had you at any time on previous trips prior to July 2, 1952, ever noticed large cinders there near the house track switch?

"A. No, sir."

Do you recall that?

A. Yes, sir.

Q. That answer given?

A. Yes.

Q. Do you recall making that answer?

A. Yes, sir.

Q. Now, the day of July 2, 1952, the day of the occurrence that we have here, you never noticed, did you, Mr. Webb, any other large clinkers in the area other than the one that you have told us that you stepped on?

114 Is that correct, sir?

A. No, sir. The footing looked level.

Q. Now, you did not get my question, Mr. Webb. On July 2, 1952, in the house track switch area, you did not notice any other large clinkers in the area other than the one that you have told us that you stepped on, isn't that correct?

A. Yes, sir.

Q. I think you testified already you had looked at the ground as you made that first step. Is that right, sir?

A. Yes, sir.

Q. And you saw nothing?

A. No, sir.

Q. You saw no large cinder?

A. No, sir.

Q. You don't know whether it was slightly out of the ground or whether it was buried completely in the ground, or exactly how?

A. It must have been completely buried, covered over.

Q. You did not see it, Mr. Webb?

The Court: He said no.

A. I did not see it.

By Mr. Bunn:

Q. So, when you say it must have been, that is more or less a guess; you don't actually know?

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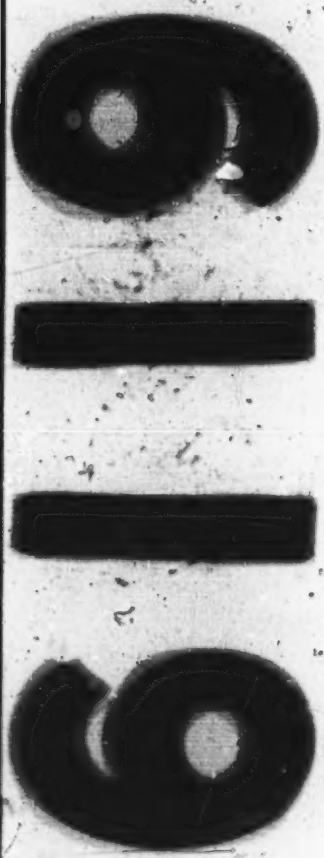

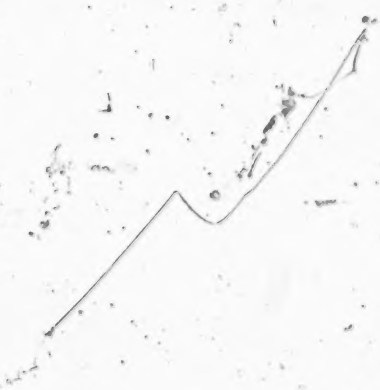

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115 A. Yes, I know.

The Court: It is self-evident he does not know, if he did not see it.

Mr. Bunn: I see, your Honor.

By Mr. Bunn:

Q. Now, this cinder that you speak of you did not see until after you fell, is that correct, sir?

A. No, sir.

Q. And when you fell, you naturally kicked up a little of the cinders around there, didn't you?

A. Yes, sir.

Q. Did you fall on your back or on your stomach?

A. I fell straight down on my leg, with my leg doubled over. I went in a down position.

Q. And then when you looked around, you saw this cinder, is that correct, sir?

A. Yes.

Q. And at that time it was just barely discernible, was it not?

A. No, sir. It was partially kicked out of the cinders, and there was a hole there by the side of it.

Q. How much of it would you say was visible?

A. Well, that would be hard for me to answer. I 116 would say two-thirds of it.

Q. Well, at the same time, Mr. Webb, back on November 4, 1954, when you made this sworn statement, do you recall the following questions being asked and the following answers given:

"Q. After you had fallen to the ground?

"A. After I had fallen to the ground I looked to see what I stepped on, sir, and it was this cinder.

"Q. And at that time how far was it protruding out of the ground?

"A. I don't know. It was sticking up a little out of the ground. I guess I kind of threw it out when I turned my foot. I would not know how far it was sticking out. It was just discernible."

Do you recall making those answers to those questions?

A. Yes, sir.

Mr. Rafferty: Object. There is no impeachment in that.

The Court: Without ruling whether it is impeaching or not, the answer may stand.

Q. You have already stated this cinder you threw away, is that right, sir?

A. Yes.

117 Q. Did you show it to any of the crew before you threw it away?

A. No, sir. There was no one standing close in the vicinity of it at the time I threw it away.

Mr. Bunn: I would like to make a stipulation at this time, to more or less make this in some sort of continuity, if I may make a stipulation to the effect that no man in the crew that accompanied Mr. Webb actually saw Mr. Webb fall, but the fireman, I believe it was, did notice him rubbing his knee.

The Court: Is that right?

Mr. Rafferty: That is correct.

The Court: Stipulated. Anything further with this witness?

Mr. Bunn: Yes, just a few more questions, your Honor.

The Court: All right.

By Mr. Bunn:

Q. Now, that cinder you stated you had never seen there before, although you were over there most every day?

The Court: That is what he said.

By Mr. Bunn:

Q. Now, Mr. Webb, you don't know when that 118 cinder was placed there, do you?

A. No, sir.

Q. You don't know who placed it there, do you?

A. No, sir.

Q. It is conceivable that cinders of that sort may have been placed there in a multitude of ways, isn't it, Mr. Webb?

Mr. Rafferty: Objected to, calling for a speculation.

The Court: Sustained.

By Mr. Bunn:

Q. Now, Mr. Webb, the operation of the train itself did not in any way cause you to slip and fall, did it?

A. No, sir.

Q. The box cars you were alongside of, they were standing still?

A. Yes.

Q. You were not touching any portion of them?
A. No, sir.
Q. And as far as the treatment at the Illinois Central Hospital is concerned, you received very satisfactory treatment, did you not?
A. Yes, sir.
119 Q. You made that statement, did you not, earlier?
A. Yes, sir.
Q. And you came up to Chicago, I think, to the hospital again about November 10, 1952, is that right?
A. Yes, sir.
Q. And you were discharged from the hospital at that time, is that correct?
A. I came up here I believe it was November 8th, and I was discharged to be effective November 10th.
Q. November 10th?
A. Yes.
Q. Were you told at that time that you could proceed to work?
A. I was released for work, yes, sir.
Q. And you remained up here, and on the same day, or the following day, you went over to see Dr. Stotz, is that right?
A. Yes, sir.
Q. He did not treat you in any way, did he?
A. No.
Q. He told you, he recommended another thirty days off, is that right?
A. He took X-rays of my leg, and then he recommended I take thirty days rest period.
120 Q. That knee has never locked on you, has it?
A. No, sir, not exactly.
Q. You spoke of aspirating the knee. That is what was done at the hospital, is that right?
A. After the operation, I think about five days, they aspirated the knee.
Q. Would you take that piece of paper, and show me where the circumference of that circle is?
A. The circumference is this (indicating).
Q. Thank you. I want you to show me a six-inch circumference, using this tape measure. Just make a circle, six inches in circumference.

Mr. Rafferty: I think it is self-evident what six inches is.

By Mr. Bunn:

Q. That would be it roughly, wouldn't it (indicating)?

A. That would be the circumference, yes, sir.

Q. And do you know what the circumference of your fist is?

A. No, sir, I don't.

Q. Now, Mr. Webb, on August 7, 1952, a claim agent for the Illinois Central came out to see you to take your statement, did he not?

A. No, sir.

121 Q. He did not?

A. No, sir.

Q. Did you come to see him?

A. I went to see him.

Q. You have a copy of that statement, don't you?

A. Yes, sir.

Q. And it is signed by you, isn't it?

A. Yes.

Q. I show you this statement and ask you whether or not that is your signature on it?

A. Yes, sir.

Q. And it was signed on or about the date it purports to bear?

A. Yes, sir.

Q. And it states in it, does it not, just above your signature:

"I have read the foregoing and it is correct"?

Is that right, sir?

A. Yes, sir.

Q. And do you recall whether the statement had in it:

"The cinders were stirred up and loose, and this large cinder, about six inches in circumference, was buried

122 in the loose cinders around it"?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. And you recall about the size of six inches in circumference being roughly that?

A. Yes, sir.

Mr. Bunn: I think that is all, Mr. Webb.
The Court: Anything further?
Mr. Rafferty: Yes.

Redirect Examination by Mr. Rafferty:

Q. Mr. Bunn referred to a statement that you gave to the claim agent on or about August 7, 1952. I wonder if you would tell the Court and jury whether this statement is included in the statement to the claim agent:

"As I started to walk to the caboose to get some waste to plug the hole with, I took one step and stepped on a cinder buried in the loose cinders. It threw me off balance and caused me to fall and I injured my left knee as I fell. This happened about 15 feet south of the house track 123 switch, on the east side of the house track. This track had been worked on shortly before this by the track men and the cinders were strewed on loose, and this large cinder, about six inches in circumference, was buried in the loose cinders around it, so it was not discernible from the rest of the small loose cinders. It looked like the surface was level. But this cinder caused my foot to turn as I stepped on it, causing me to fall so I injured the cartilage in my knee when I fell. It pained me severely"?

Mr. Bunn: Your Honor, I think this is nothing but a self-serving declaration.

The Court: Do you intend to introduce it?

Mr. Rafferty: I would be satisfied to have the whole statement introduced.

Mr. Bunn: I don't object to the introduction of it.

The Court: All right. It may go in without further reading.

Mr. Rafferty: May we have it identified for the record, as Plaintiff's Exhibit 2?

(Said document, so offered and received in evi-
124 dence, was marked Plaintiff's Exhibit 2.)

By Mr. Rafferty:

Q. At the scene of the accident, did you have any tape measure to measure this cinder?

A. No, sir.

Q. Did the claim agent bring any tape measure with him to demonstrate to you what a circumference of six inches might be?

A. No, sir.

Q. At the time you talked to the claim agent, did you make any reference to the cinder as being approximately the size of your fist?

A. Yes, sir.

Q. Mr. Bunn inquired as to whether or not you had done any work in the passenger service since the time of the accident. Can you tell the Court and jury approximately how many days since December 1952 you have had an opportunity to work on the passenger service either as flagman, brakeman or baggage man, how many chances have you had?

A. Since when?

Q. Since you went back to work in December 1952 how many opportunities have you had to work in passen-

125 ger service?

A. Very few.

Q. Could you give us a rough estimate of how many?

A. Well, I would say not over six or eight times.

Q. Now, from the standpoint of conductor's work being available to you, do you know how many men from the standpoint of seniority have prior right to the conductor's job over you; how many men are ahead of you that can take the conductor's work before you have a chance?

A. That has not got conductor's jobs at the present time?

Q. Yes, who are not working as conductors, who have greater rights than you have to that conductor's job?

A. About six or seven, I would say at the present time. I don't know just exactly who holds the youngest job as conductor.

Q. Mr. Webb, will you tell the Court and jury the difference between the amount of work available in through freight or regular freight service as opposed to local freight service, the job you are holding down now?

A. I don't understand the question?

Q. Well, is the work week longer in a regular

126 freight service, the average work week?

A. No, sir.

Q. How about local freight?

A. That was six days a week, every week.

Q. And what about overtime on the local freight work?
A. We got a lot of overtime on it practically every day.
Q. When does overtime start in railroading?
A. Well, on the northbound train it starts at eleven hours and fifty-five minutes.
Q. And what about trains going in the opposite direction?
A. Southbound trains your overtime starts at the expiration of twelve hours and nineteen minutes.
Q. And have you stated that overtime work was the regular thing in that type of service?
A. In local service, yes.
Q. For what reason, then, are you holding the job in through freight or regular service rather than local freight service?
A. It is an easier job, shorter hours, less work.
The Court: I think you have covered that.
By Mr. Rafferty:
Q. Does the Illinois Central Rialroad have a compulsory retirement age for brakemen or switchmen or
127 conductors?
A. No, sir.
Q. Mr. Bunn referred to the fact that you missed no work in December of 1952 after returning to work from your hospital stay and convalescence. Is that the same period of time you testified earlier that the other members of the crew were doing the heavier work?
A. Yes, sir.
Q. Mr. Webb, I believe you stated that certain repair work had been done near the house track switch before this accident happened. Had you received any orders or instructions prior to that time with reference to working at this particular end of the track as opposed to the other end?
A. Yes.
Q. What were the instructions?
A. The instructions were that the south end of the passing track could not be used on account of the section men working. Sometimes the orders would tell us why and sometimes they would not.
Q. How many trips did you make to this scene of the accident after receiving notice that repairs were being made thereon, I mean, just before this accident happened?

A. I don't recall. I just don't understand your
128 question.

Q. On any type of service I understand you had been told not to use that particular end of the track.

A. Yes.

Q. Then apparently you got instructions you could use it. Approximately how many times after you got instructions that you could use it did you go into the track there before this accident happened?

A. I don't know if we went on that portion of the track or not, but I passed through there.

The Court: You don't know — is that your answer?

The Witness: Yes, sir.

The Court: All right. Anything further?

Mr. Rafferty: I believe that is all with this witness.

The Court: Anything further?

Mr. Bunn: Just a couple of questions, your Honor.

Recross Examination by Mr. Bunn:

Q. This repair work that was done, do you know approximately when it was done, Mr. Webb?

129 A. It was in the month of June, I believe.

Q. About the middle or latter half or first half?

A. Well, I would not know. It was during the month. I don't know exactly if it was the first part or the middle or all month, but there were different days that we had this order that Mr. Rafferty referred to not to use the track. Maybe we would go through there a couple of days, you know, that we would not get this order.

Q. But this work was all completed when you made your trip July 2nd, was it not?

A. As far as I know, yes.

Q. And during the year of 1954, Mr. Webb, you have taken over the conductor's job, have you not, on the local and on the through freight quite often?

A. When my seniority entitled me to, yes.

Q. Even though there are five or six others ahead of you at the present?

A. If I am available at my home terminal, these five or six men that are ahead of me may be some place else; they may be at the other end of the road, and that would give me, entitle me to the first call.

Mr. Bunn: I think that is all your Honor,

130 The Court: Is that all?

Mr. Rafferty: That is all.

Mr. Rafferty: At this time I would like to read 131 into the record the life expectancy of Mr. Webb.

Ladies and gentleman, according to the American Experience Table of Mortality, the life expectancy of a man 48 years of age, which is Mr. Webb's present age, is 22.36 years.

Your Honor, subject to the Court's ruling on the admission of Plaintiff's Exhibit 1 for identification, the pay scale, plaintiff rests.

The Court: The jury may recess until 2:00 o'clock.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

The Court: Whatever motion you have to make, I will take it under advisement until further order of the Court.

Mr. Bunn: To whom shall I submit them, to the Clerk?

The Court: Yes, or hand them to me now.

Mr. Bunn: I have motions at the close of plaintiff's case.

The Court: You have them?

Mr. Bunn: I have them with me, yes, sir.

The Court: And your suggested instructions, bring them in at 2:00 o'clock. You number yours, and you letter yours. Have a copy available for each other.

Mr. Rafferty: I letter mine, and Mr. Bunn numbers his?

132 The Court: Yes.

(Whereupon a recess was taken to 2:00 o'clock p.m. of the same day, February 21, 1955.)

* * (Caption No. 53 C 1687) * *

133 Before Judge Sullivan and a Jury, Monday, February 21, 1955, 2:00 o'clock p.m.

Court met pursuant to a recess.

Present:

Mr. Robert J. Rafferty,
Appeared on behalf of the Plaintiff;
Mr. William F. Bunn,
Appeared on behalf of the Defendant.

Thereupon the Defendant, to maintain the issues on its part, offered the following evidence.

LESTER RECTOR, called as a witness on the part of the Defendant, being first duly sworn, testified
134 as follows:

The Court: What is your name?
The Witness: Lester Rector.
The Court: Where do you live?
The Witness: Litchfield, Illinois.
The Court: What is your business?
The Witness: Track inspector.
The Court: What road?
The Witness: Illinois Central.
The Court: All right. Go ahead.

Direct Examination by Mr. Bunn:

Q. How long have you been employed by the Illinois Central?
A. 34 years.
Q. Calling your attention to the month of July of 1952, what was your occupation?
A. Section foreman.
Q. And you were section foreman of what section?
A. Section DA-14, I believe it was.
Q. Now, Mr. Rector, will you speak up so all the ladies and gentleman of the jury and his Honor, the Judge,
135 can hear you? The section that you were the foreman of, did that have a name, or did you have a name for that section?
A. I beg your pardon, I did not get the question.
Q. Is there a name for the section you were working on?
A. South Litchfield.
Q. Does that section include the tracks, both main and passing at Mount Olive, Illinois?
A. Yes, sir.
Q. Prior to July of 1952, how long had you been section foreman for that section?
A. Oh, approximately 31 years. On that section? No. On that section about 15 years.

Q. Just tell the ladies and gentleman of the jury generally the nature of your duties as a section foreman.

A. Well, my duty as a section foreman was the general maintenance of eight miles on the main line and adjoining side tracks, which we had two, one at Litchfield and one at Mount Olive, and other tracks, house tracks we call them, or inside tracks. At Mount Olive we had a track, a house track, a lumber stub and mill track, as they were called. It was my duty to maintain those and keep
136 them in safe condition.

Q. Mr. Rector, did you have any men working under you?

A. Yes.

Q. How many men did you have?

A. Four.

Q. Did you have any equipment at your disposal?

A. Yes, sir. I had a motor car, push car, tamping machine, and other tools that were used in the maintenance of the track.

Q. And the tamping machine, what is it for?

A. An electric tamping machine for servicing purposes. When you raise tracks out of place, three, four or five inches, we have a program of two or three miles in one stretch, and we use a tamping machine to tamp the ties.

137 Q. Now, Mr. Rector, in July of 1952, and prior thereto, what was the nature or what was the type of material used on your section as ballast?

A. A chat ballast was used at that time.

Q. And chat is what?

A. It is small rock or crushed stone, very small.

Q. All right. The chat was on what line?

A. I beg your pardon?

Q. Did you say the chat was on a certain line?

A. It was on the main line and the side tracks at that time.

Q. Now, as far as any repairs to the roadbed or the shoulder in your section, who would be the man immediately in charge of those repairs?

A. It would be myself at that time.

Q. And who would actually do the repair work?

A. The supervisor directly over me would be the man that would instruct me to do the repairs.

Q. And the laborers on the job, who would they be?
A. They would be under me, under my jurisdiction.
Q. To the best of your knowledge, Mr. Rector, do you recall any repairs or resurfacing or re-tieing of the area located around the house track switch at Mount Olive, Illinois, prior to July of 1952?
138 A. Yes, sir.
Q. To the best of your knowledge, when was that work done prior to July of 1952?
A. In the latter part of March. I don't know the date.
Q. Now, did you make a record of the work done at that time?
A. I did have a record of it, but after I was transferred to the present job I have destroyed them. I did not figure I would ever need them again, and did not keep any records.
Q. To the best of your knowledge, was any work done around the area of the house track switch from the time that you mentioned in March, 1952, to July 2nd, 1952?
A. No, sir, there was not.
Q. Can you describe generally the work that was done around the house track switch in March of 1952?
A. Well, we gave this house track switch a raise of approximately five inches, tamped the ties up, and put the switch up in good condition, run the surfacing back on the house track far enough to make it safe.
Q. Now, did you require the use of any additional ballast when you did that work?
A. Yes.
Q. And what was the material that was used for 139 the additional ballast?
A. We used chat and cinder mixture.
Q. And the chat and cinder mixture came from where?
A. It came from along the passing track just north of this house track switch. We had some surplus there that we had not used in re-laying the passing track, and we gathered that up, and trucked it in to this location, and used that for ballasting the surface on.
Q. This ballast then was the same type of ballast that was being used on the passing track?
A. Yes, sir, the same ballast.

Q. And do you recall approximately how long it took you and your men to do that job?

A. About two days to complete the job.

Q. And would you have any idea of approximately how much ballast was required to be trucked in?

A. Oh, fifteen yards, approximately that.

Q. Fifteen what?

A. Yards.

Q. Now, when this additional ballast was being trucked in, were you personally there on the job?

A. Yes, sir.

Q. And did you personally inspect the ballast being brought in?

140 A. I did, yes, sir.

Q. Now, to the best of your ability, can you indicate about the size of the cinders and the ballast that was trucked in?

A. The cinders was pretty clean along with this chat that we gathered up. I would say two inches in diameter would be about the largest. Of course, I have no way of knowing exactly, but about.

Q. Well, now, is any particular use made of larger cinders, if any are found?

A. We never use them if we can avoid it, of course. The larger cinders we take and either bury them or haul them away and dump them in a hole someplace, and dispose of them that way.

Q. Are the larger cinders ever used in raising the track?

A. No, sir.

Q. Following the completion of the work done around the house track switch in March of 1952, did you have occasion to personally inspect the work that had been done?

A. Yes, sir.

Q. And prior to the work being done there in March of 1952, did you have occasion in the past as section foreman to instruct the men under you as to what

141 should be done with any large cinders found or seen?

A. Yes.

Mr. Rafferty: Object to any instructions or conversation with the witness as not material.

The Court: Yes. You may locate the time and place.
By Mr. Bunn:

Q. Who were the men working under you during that time, Mr. Rector?

A. I don't remember all of them. One man that died, in particular, Harry Wolfe; Bill Young; Harold Boland.

The Court: That is not the question. Who gave the instructions.

Mr. Bunn: Mr. Rector did.

The Court: To these people he has mentioned?

Mr. Bunn: Mr. Rector did. He gave the instructions.
By the Witness:

A. (Continuing) That is all I can recall at the present time. There were two or three more, but I cannot call their names right at the present time.
By Mr. Bunn:

Q. Would you conduct safety meetings for the men
142 under you?

A. Yes. We had a safety calendar, we had a number of safety rules to read every morning, and we made a habit of doing that.

Q. During the course of these meetings that you conducted, did you ever have occasion to discuss the question of clinkers?

A. Yes. That was one of our regular discussions, especially on side track work, when we would go on side track work, to dispose of those.

Q. Now, Mr. Rector, back in July of 1952, how often would you have an occasion to be down around the Mount Olive house track switch?

A. You mean after this work was done, or after July? I did not get your question.

Q. I say, during the year of 1952, how often would you have occasion to be down around the Mount Olive house track switch?

A. Well, if I had no work there, twice a week, I would average twice a week down there to inspect the track and switch.

Q. What would your inspection entail; what would you inspect for?

A. Inspect for bad footing, any objects that might
143 be laying around, condition of our switches and tracks in general.

Q. Well, now, after the work was completed around the house track switch in March of 1952, did you have any knowledge as to whether or not any of the train crew or other employees of the Illinois Central Railroad ever complained to you about the footing conditions there?

A. No, they did not.

Q. Now, approximately how many times had you repaired or re-tied or resurfaced track during your 33 or 34 years with the railroad?

A. Well, that was the regular job. I would say every year, different amounts every year.

Q. I mean once a year, or more times a year, or what?

A. Sometimes maybe we would have two or three schedules there in the summer months. We would surface maybe a mile one spot, and wait a couple of weeks or a month, and surface another spot someplace.

Q. Mr. Rector, based upon your experience in re-tieing, resurfacing or reballasting the track along the right-of-way of the Illinois Central, did you feel on the completion of that job, March, 1952, that that job was done in a workmanlike manner and did afford good and sufficient footing for the trainmen?

144 A. Yes, that is right.

Mr. Rafferty: Object to that, your Honor.

The Court: Sustained.

Cross Examination by Mr. Rafferty:

Q. Mr. Rector, I believe you stated your territory included about eight miles of mainline track?

A. Yes.

Q. And certain house tracks and side tracks were also under your jurisdiction?

A. Yes, sir.

Q. About how great an area would that be, another mile or two of that type of track?

A. I did not get the question, sir.

Q. About how much length would be involved in these various side tracks that you serviced in addition to the main line tracks?

A. You mean the length of the side tracks?

Q. Yes.

A. Approximately one mile.

Q. In other words, you would have a distance of approximately nine miles, and yourself and four laborers working under you would take care of that amount of track?

145 A. We had two section gangs doubling together on this one particular job we were just talking about.

Q. The Mount Olive job?

A. The Mount Olive job, we had two section gangs working together.

Q. I believe you stated that your records as to the time of these repairs had been destroyed?

A. The time of the repairs?

Q. Your records covering this particular period had been destroyed?

A. I did not hear you, sir.

Q. Do you have in your possession any record that shows that the repairs on the Mount Olive house track were made in March of 1952?

A. No, sir. I have no records; I destroyed them.

Q. Would anybody else have any records showing the time the repairs were made that you know of, Mr. Rector?

A. Not that I know of.

Q. When did you first know that there had been an accident involving Mr. John Webb?

A. It was in October following the work that I did there in March.

Q. In October of 1952?

A. In October, yes, sir.

146 Q. At that time did you have the records in your possession showing the date the repairs were made on the house track?

A. Yes, I did.

Q. Have you destroyed the records since that time?

A. Yes. I changed jobs was the reason for it.

Q. Are you a section foreman now?

A. No.

Q. What are you now?

A. Track inspector.

Q. As track inspector do you cover the same area of territory as you had as section foreman?

A. No, sir.

Q. Do you have any part of the same territory?

A. No, sir.

Q. I believe you stated, Mr. Rector, that approximately 15 yards of ballast were used in repairing the house track.

A. Approximately.

Q. You mean by that cubic yards?

A. Yes, sir.

Q. I understand you inspected this ballast.

A. Yes. We load it by hand on the push cars and in that way we could watch the loading of it. I did watch
147 the loading of it.

Q. Were you there watching four different men load shovel by shovel?

A. Sure. It was right there. They were loading from both sides and I saw every shovelful.

Q. And you never saw large clinkers in that mixture at all?

A. No, sir.

Q. Did you screen the ballast or do anything to separate large particles from small ones?

A. Yes.

Q. Was this ballast screened that was used in the house track at Mount Olive?

A. It was a clean ballast, with good mixture.

Q. I asked you whether this ballast was screened.

A. Screened?

Q. Screened.

A. No, sir. I did not get the question.

Q. I believe you stated, Mr. Rector, that you would not use a large clinker in the ballast near a switch stand, is that right?

A. That is right, I would not.

Q. Would you use ballast with clinkers the size of a man's fist?

148 A. No, sir.

Q. That would not belong in the roadbed near a switch stand, would it, Mr. Rector?

A. No, sir.

Q. I believe you stated, Mr. Rector, this job took bout two days?

A. Yes, sir.

Q. Did you spend all your time on that job, or were you working at some second place in the territory?

A. Right there on that job, sir.

Mr. Rafferty: That is all.

Mr. Bunn: That is all.

(Witness excused.)

ED OELRICHS, called as a witness on the part of the Defendant, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Ed Oelrichs.

The Court: Where do you live, Mr. Oelrichs?

The Witness: Mount Olive, Illinois.

The Court: Mount Olive?

The Witness: Yes.

The Court: What do you do?

149 The Witness: Track inspector.

The Court: For what road?

The Witness: Illinois Central.

The Court: How long have you been with the Illinois Central?

The Witness: Twenty-eight years.

The Court: Go ahead, Mr. Bunn.

Direct Examination by Mr. Bunn:

Q. Mr. Oelrichs, in your capacity of track inspector, how long have you held that job?

A. It will be ten years the 1st of May.

Q. And you are track inspector of what territory?

A. From Litchfield to Glen Carbon.

Q. And does that include the Mount Olive track?

A. Yes, sir.

Q. Can you tell us generally the nature of the duties of a track inspector?

A. A track inspector is to go over his territory and see that everything is in safe condition.

Q. Mr. Oelrichs, you work under whom? Who is your immediate superior?

A. John F. Brosnahan.

Q. Do you have any equipment that you work with?

150 A. Yes. I have a motor car and proper tools, wrenches, track bolts, scoop, level board and gauge.

Q. And during the year of 1952, how often would you have occasion to travel on the main line past the Mount Olive house track switch?

A. Five days a week.

Q. And during that same period, about how often would you have occasion to travel over the house track switch at Mount Olive?

A. Oh, once or twice a week; sometimes oftener.

Q. And in passing over the Mount Olive house track switch, are you governed at all as far as speed is concerned of the motor car?

A. I don't quite understand the question.

Q. Do you maintain any regular speed over the house track switch or don't you?

A. Yes, sir.

Q. About what speed do you go over the house track switch?

A. About three to five miles per hour.

Q. And is it part of your duty to inspect the tracks?

A. Yes.

Q. The ties?

A. Yes, sir.

151 Q. The roadbed?

A. Yes, sir.

Q. And the shoulder?

A. Yes, sir.

Q. And if you find anything you feel needs rectifying, what do you do, if anything?

A. Correct it.

Q. If you don't have equipment to correct it, what do you do?

A. Notify the proper authority.

Q. And in this case, who would that be?

A. The section foreman.

Q. Now, Mr. Oelrichs, to your own knowledge did any man of the Illinois Central Railroad ever complain to

you about footing conditions around the house track switch at Mount Olive, Illinois, in 1952?

A. No, sir.

Q. Or prior to that?

A. No, sir.

Mr. Bunn: That is all.

Cross Examination by Mr. Rafferty:

Q. What is the territory that you cover as track inspector?

152 A. Litchfield to Glen Carbon, Illinois.

Q. How many miles is that?

A. Forty and one-quarter one way. You go that round trip.

The Court: Twenty miles one way?

The Witness: No, forty and one-quarter one way. It is eighty and one-half the round trip.

By Mr. Rafferty:

Q. Did you make that trip every day?

A. Five days a week.

Q. Each day for five days a week you make that trip?

A. Yes. Days of rest on Thursday and Friday.

Q. Does that give you much opportunity to inspect the ballast alongside the shoulder of the road?

A. Yes, sir.

Q. At what speed do you go over the house track switch at Mount Olive, Illinois?

A. About three to five miles an hour.

Q. Does that give you an opportunity to inspect the ballast alongside the roadbed?

A. Yes.

Q. Could you or could any person in your employment or doing your type of work see a large clinker the size of a man's fist imbedded in soft cinders, that was below

153 the surface?

A. Please repeat the question.

Q. Could either you or any person doing your work observe a large clinker, the size of a man's fist, imbedded below the surface in a roadbed?

A. It would be pretty hard to see.

Q. It would be impossible, wouldn't it?

A. Well, I would not say impossible.

Q. Do you believe you could do it, Mr. Oelrichs?
A. Did you say imbedded?
Q. That is right.
A. Well, if I was walking along I probably could see it.
Q. Did you make it a practice to make a walking inspection of the shoulder along the right-of-way of the forty and one-quarter odd miles of track that you covered as track inspector?
A. No, sir.
Q. Did you make it a practice to make a walking inspection of the roadbed alongside the house track switch at Mount Olive, Illinois?
A. At times, yes, sir.
Q. When was the last time you remember of an inspection preceding July 2, 1952, a walking inspection?
154 A. Well, I would not recall the exact date, but I have several switches there, and at times I pull off at the road crossing just south of the house track, and walk up to the switch along the roadbed.
Q. You don't know the last time you did that preceding July 2, 1952?
A. No, sir.
Q. Do you know how frequently you did that after repairs were made along that particular section of track?
A. Repeat that question, please.
Q. Let me ask you this: Do you know when the last time was that repairs were made adjacent to the house track switch before July 2nd, 1952?
A. Well, I think it was in March.
Q. Do you have any independent recollection of it being done in March?
A. Well, I just remember that they surfaced this track at that time.
Q. Do you have an independent recollection of it being done in March?
A. Well, the section foreman.
Q. Mr. Lester Rector is the one that told you it was done in March?
A. Well, I remember talking to him about it
155 when he surfaced this track.

Q. Do you remember talking to him about it the last few days?

A. No, sir.

Q. Did you come up with Mr. Rector to testify at this trial?

A. Yes, sir.

Q. And have you been over at the Claim Department of the Illinois Central Railroad talking about your testimony?

A. Yes, sir.

Q. And was Mr. Rector present then?

A. Yes, sir.

Q. Did Mr. Rector tell you that he had had certain records which showed the repairs were done in March of 1952?

A. I don't recall.

Q. Let me ask you this again, Mr. Oelrichs: Is your recollection of the repairs being made to this section of track in March of 1952 an independent recollection of your own, or do you base that upon some statement made by Mr. Rector or by somebody else?

A. Well, I did talk to Mr. Rector the other day when this case came up. That is the first I heard about this
156 case. I never knew anything about this case.

Q. Did Mr. Rector tell you then that he had made repairs to the track adjacent to the house track switch at Mount Olive, Illinois, in March of 1952?

A. Yes, he probably did.

Mr. Rafferty: That is all.

Mr. Bunn: That is all.

(Witness excused.)

JOHN J. BROSNAHAN, called as a witness on the part of the Defendant, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: John J. Brosnahan.

The Court: Where do you live?

The Witness: Springfield, Illinois.

The Court: What is your business?

The Witness: I am supervisor of track, Illinois Central.

The Court: How long?

The Witness: I have been supervisor of track thirteen years.

The Court: How long have you been with the Illinois Central?

157 The Witness: About twenty-six years.

The Court: Proceed.

Direct Examination by Mr. Bunn:

Q. Mr. Brosnahan, your territory in the month of July, 1952, was what?

A. From Springfield to Glen Carbon.

Q. And does that territory include Mount Olive, Illinois?

A. Yes, sir.

Q. And as track supervisor, did you have, during that period, jurisdiction over the Illinois Central main track through Mount Olive?

A. Yes.

Q. How about the IC passing track?

A. Yes, sir.

Q. The house track switch and the house track at Mount Olive?

A. Yes, sir.

Q. How long from July of 1952 back, how long had you been track supervisor of this section?

A. I had been in that district for five years.

Q. Now, Mr. Brosnahan, can you just tell us generally the nature of the duties of a track supervisor?

158 A. A track supervisor has section gangs under his jurisdiction who maintain and construct the roadbeds, keep the tracks in alignment, and apply ties and ballast.

Q. And in 1952, how many section gangs did you have under your jurisdiction?

A. In 1952 I had twelve section gangs.

Q. And one of those section gangs included the South Litchfield section that Mr. Rector was the section foreman of, is that correct?

A. Yes.

Q. Each section gang has a section foreman, has it not?

A. Yes, sir.

Q. Now, what equipment do you have personally to work with, Mr. Brosnahan?

A. I go over my territory on an average of two or three times a week on a light inspection motor car.

Q. I see. And do you travel alone, or are you accompanied by anyone?

A. No. I have a man operate the car for me.

Q. Mr. Brosnahan, when there is any construction or maintenance work to be done on your section, how is it determined, who determines whether the work is to be done?

159 A. Well, I usually plan the work with the section foreman. He and I plan together. I arrange for the material, and the section gang does the work.

Q. And are any records kept of the work that is done?

A. We send a small daily card, that is, the foreman sends a small daily card in to the Clinton office, to the supervisor's office, at the end of each work day.

Q. And are those records available at this time?

A. No, sir, they are not. For one year they keep the records for comparison purposes, and after one year they are destroyed.

Q. I saw you down in Clinton Saturday, did I not?

A. Yes, sir.

Q. At that time did I ask you to get the records if they were available?

A. Yes, sir.

Q. And they are not available?

A. No, sir, they are not.

Q. Mr. Brosnahan, do you have any recollection of any construction or maintenance work done around the Mount Olive, Illinois, house track switch during the year of 1952?

A. I have no definite knowledge.

Q. Well, then, during the year of 1952 could you 160 tell us briefly what type of ballast was on the roadbed in your territory?

A. In 1952 we had a chat ballast, which is crushed stone, on the main track, and a combination of chat and cinders on the side tracks.

Q. Can you explain briefly to the ladies and gentlemen of the jury the purpose of ballast on a railroad roadbed?

A. The ballast is placed between the ties for holding the ties in alignment, holding the track in alignment, and to tamp under the ties to make the rails even.

Q. Now, this motor car that you described earlier, at about what speed would you travel along the main line?

A. About 15 to 20 miles per hour.

Q. And as far as the trips that you made, did you observe, or did you compile records, or what did you do on those trips?

A. Well, I observed the surface of the track, that is, the alignment of the rails, the general condition of the ballast, the general condition of the right-of-way, and contacted the section foremen about work.

Q. And during the year 1952, your capacity as track supervisor, how often would you pass Mount Olive, Illinois?

A. About once a week.

161 Q. And would you ever have occasion to go over to the Illinois Central house track and over the Illinois Central house track switch?

A. I would say once every three weeks or four weeks I would pass over the siding and house track switch.

Q. Would you ever stop at the switch or at the siding?

A. Well, once in a while we would, I would stop; not on every trip, no.

Q. And the purpose of these trips onto the siding and switch would be what?

A. For inspection.

Q. You have already testified you would inspect the ballast also?

A. Yes, sir.

Q. On these trips over your territory, have you ever had occasion to notice any clinkers in the ballast?

A. Yes, sir.

Q. And if you find them, do you take any corrective measures?

A. Yes, sir, I would arrange for the section foreman to have them removed.

Q. And have you on your trips ever observed any clinkers or objects or anything foreign to the roadbed imbedded in the ballast?

162 A. Yes, sir.

Q. And did you do anything when you observed that?

A. Yes, sir. If it was in a place where men would be working or walking, I would have them removed, any place where there is bad footing.

Q. And during the yea r1952, would you instruct your section foremen to the same effect?

A. Yes, sir.

Q. Now, Mr. Brosnahan, have you ever received any complaint about the footing conditions around the house track switch at Mount Olive, Illinois?

A. No, sir, I have not.

Q. That includes during the year of 1952?

A. Yes, sir.

Mr. Bunn: Your witness, Mr. Rafferty.

Cross Examination by Mr. Rafferty:

Q. I believe you stated, Mr. Brosnahan, that your territory was from Springfield, Illinois, to Glen Carbon?

A. Yes, sir, that is right.

Q. In terms of miles, how lengthy a territory is that?

A. That is a little over forty miles.

Q. I believe you stated that the records of your department which would show the date the repairs were
163 made on the track adjacent to the house track switch at Mount Olive, Illinois, have been destroyed?

A. Yes, sir.

Q. When was the first time that any representative of the railroad Claim Department contacted you with reference to those records?

A. Last Saturday.

Q. If any representative of the Claim Department had communicated with you within one year after July of 1952, could you have saved the records to show when the repairs were made?

A. I beg your pardon. I did not understand that.

Q. If any representative of the railroad had communicated with you within one year after July 2, 1952, would you then have had records showing where repairs were made?

A. Yes.

Q. But no representative contacted you?

A. No, sir.

Q. I believe you stated the various purposes of ballast. Let me ask you, Mr. Brosnahan, if one of them is not to afford safe footing for trainmen whose duties require them to work in or about switch stands?

A. Yes, sir.

164 Q. In your opinion, Mr. Brosnahan, would the presence, if it existed, of a clinker the size of a man's fist, imbedded in the cinders, adjacent to a switch stand, represent a safe place for a trainman to work?

A. No, sir.

Mr. Rafferty: That is all.

Mr. Bunn: That is all.

(Witness excused.)

Mr. Bunn: If your Honor please, at this time I would like to make another two stipulations, with the consent of Mr. Rafferty.

Mark these Defendant's Exhibits 2, 3 and 4.

(Whereupon said documents were marked respectively Defendant's Exhibits 2, 3 and 4.)

Mr. Bunn: Defendant's Exhibits 2, 3, and 4 are bills from the Illinois Central Hospital, and the doctor, Chester C. Guy, who performed the operation on Mr. Webb, to show that they have been paid by the Illinois Central Railroad Company.

The Court: They may be admitted in evidence.

(Said documents, so offered and received in evidence, were marked, respectively, Defendant's Exhibits 2, 3 and 4.)

165 Mr. Bunn: Mr. Rafferty has also agreed that we may read in evidence the rule of the Illinois Central Hospital Department as follows:

"The company will pay all expenses of employees injured on duty and for the care of passengers or others injured on its right-of-way for which it may be obligated."

Mr. Rafferty and myself have also agreed to stipulate, your Honor, as to the statements that I read from this book, that if the Reporter who took the original statement were to come in and testify, he would testify that the questions I read and the answers I read were the questions asked of and answered by Mr. Webb on November 4, 1954.

Mr. Bunn: I think the defendant rests now, your Honor.

Mr. Rafferty: Plaintiff rests — the only question is with reference to Plaintiff's Exhibit 1. I think Mr. Bunn wanted to verify that before your Honor formally ruled on it.

Mr. Bunn: May we check on that at this time? May I suggest a five minute recess while we check this.

The Court: We may take a recess and take up the other matters after the jury goes out.

166 Mr. Bunn: I don't have our own book here. We don't think this is wrong. I think if Mr. Webb took this from their Brotherhood papers it is all right.

The Court: I will admit them, and in the meantime I am going to take up the other matters after the jury goes. You can check on it between now and the time we convene.

Mr. Rafferty: For the record, may I offer in evidence Plaintiff's Exhibit 1?

The Court: Yes, it may be received.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

The Court: Both sides rest?

Mr. Rafferty: Yes.

Mr. Bunn: Yes.

The Court: The jurors will remember their instructions. Tomorrow is one of the few holidays in the United States Courts, Washington's Birthday. So you may go until Wednesday morning, a little before 10:00. You may retire.

(Whereupon the jury retired from the court room, and the following proceedings were had out of the presence and hearing of the jury:)

167 The Court: Before we take up the instructions, have you the instructions at the close of the defendant's case?

Mr. Bunn: I instructed one of our secretaries to prepare them this morning. Apparently they have not brought them over yet.

The Court: I have not looked over them carefully. Are you making a separate one as to each one of the charges of negligence set out?

Mr. Bunn: Yes, each one of the charges of negligence, and an instruction as to the entire complaint.

The Court: Yes, I know. Have you looked over your charges of negligence?

Mr. Rafferty: Yes, your Honor. I would be satisfied to go to the jury on the sub-count (A), a safe place to work.

The Court: All right. I will tell you what to do. That will be an easy matter to dispose of. You withdraw the charges of negligence set out in B, C and D.

Mr. Rafferty: That is correct, in Paragraph 6 of the complaint.

The Court: That is right. So Mr. Rafferty is now asking for (a) alone to go to the jury. So that disposes of a good deal of the matter set up in your motions, Mr. Bunn.

168 Well, you don't attack (a) individually, that is, specifically; you attack it in your general motion.

Mr. Bunn: There is also one attacking it specifically as to Paragraph 6 (a) of the complaint.

The Court: Yes, here it is. Well, as to 6(a), your motion to instruct the jury to find the defendant not guilty will be denied; and likewise as to your general instruction, that will be denied, at the close of plaintiff's evidence; and that will be the same ruling on your other motions. (b), (c) and (d) are out of the case.

Mr. Bunn: I will just present written motions and file them even though they have already been denied?

The Court: Yes, I will deny them when they come in. So that will dispose of your motions.

And the motion for a directed verdict at the close of all the evidence will be denied.

169 The Court: Well, let us see what we have here. We will take plaintiff's instructions. Have you had time to look at them?

Mr. Bunn: Just partially.

The Court: I looked at them hurriedly. They seem to be stock instructions. I don't know, there may be something you want to object to. I will hear you on that Wednesday morning.

Mr. Bunn: Wednesday morning you will pass on them?

The Court: Yes. Let us see about the defendant's instructions.

Mr. Rafferty: The only one I would object to is No. 4, and that is because I have withdrawn certain charges from my complaint. It refers to "one or more acts," I believe that if your Honor will start at the end of the second line and delete the words "one or more of—"

The Court: Yes. There is only one act.

Mr. Rafferty: Singularize the word "acts." Then I believe the instruction would be in order, and then I believe the other defendant's instructions are correct.

The Court: "One of the acts."

Mr. Rafferty: "Guilty of the act of negligence charged in the plaintiff's complaint," I think it should be.

I also see Mr. Bunn has included an instruction de-
170 fining negligence, which I am inclined to think is almost word for word the same as mine. I have no objection to withdrawing mine; or if he cares to withdraw his No. 10—they are duplicates.

The Court: What is your number?

Mr. Rafferty: Mine is letter "I."

The Court: All right. I will let you withdraw it.

Mr. Rafferty: All right, your Honor.

The Court: That is proximate cause. No—that is J. Wait a minute.

Mr. Rafferty: J I do want given, your Honor. That is proximate cause.

The Court: Oh, yes.

Mr. Rafferty: Instruction I defines negligence. That is a duplicate of Mr. Bunn's No. 10.

The Court: You are withdrawing I?

Mr. Rafferty: I withdraw I.

The Court: If there is anything you want to call the Court's attention to that you have overlooked, you may do that Wednesday morning.

How long do you gentlemen want to talk about the case to the jury?

Mr. Rafferty: I think about half an hour will be ample time for me.

171 The Court: Twenty-five minutes on a side. All right.

(Whereupon an adjournment was taken to 10:00 o'clock a.m., Wednesday, February 23, 1955.)

172

* * (Caption No. 53 C 1687) * *

Court convened pursuant to adjournment.

Present:

MR. ROBERT J. RAFFERTY,
Appeared on behalf of the Plaintiff;
MR. WILLIAM F. BUNN,
Appeared on behalf of the Defendant.

The Court: I told you gentlemen to look over your instructions; and if you had any further comments, to make them this morning. I will take up plaintiff's instructions first. Are there any objections to plaintiff's instructions?

Mr. Rafferty: I believe it was K, the complaint instruction. I have revised it in several points, your Honor.

The Court: You are withdrawing K and substi-
173 tuting another one for K?

Mr. Rafferty: That is correct, your Honor.

The Court: Is there anything further about the plaintiff's instructions?

Mr. Bunn: Judge, over the holiday yesterday I had a chance to go over the instructions, and I want to call to the Court's attention several instructions that I had noticed that I think might possibly not be proper here.

First of all, the plaintiff's instruction No. A has to do with interstate commerce. That has already been stipulated to. It is accepted. It is no longer in issue.

The Court: What about that?

Mr. Rafferty: The instruction A, your Honor, merely tells them that the parties are subject to the Federal Employers Liability Act, that they were engaged in interstate commerce.

The Court: I think I will give that. What else?

Mr. Bunn: Again in Instruction B, and the same applies to C, certain sections of the Federal Employers Liability Act are set out, and again the provisions of that statute are not in dispute. It is admitted the parties fall under that statute. I think Mr. Rafferty's instruction,
174 where the specific charge of negligence is "failing to provide the plaintiff with a reasonably safe place to

work," I think that is the basis of the negligence under which this suit is brought. Therefore, B and G, not being in issue, I don't think they would be applicable here.

Mr. Rafferty: I think they are proper. They tell the jury the law under which the case is brought.

The Court: Yes. I gave some thought to that when I went into it. I will give those.

Mr. Bunn: Well, now, Judge, if I may at this time also make a statement insofar as plaintiff's instruction C is concerned, instruction C deals with the assumption of risk, and that has never been a defense, affirmative or otherwise, on the part of the defendant. I think that an instruction of that sort unduly prejudices the defendant in that when it is read to the jury, I think it tends to lend credence to a theory that any time a man is hurt on the job, anything may be wrong on the premises, any defect of any sort, he does not assume anything that he finds wrong.

The Court: What do you say?

Mr. Rafferty: This is the language of the statute itself, and jurors may commonly believe railroading is a dangerous occupation and, therefore, if a man gets
175 hurt, it is too bad.

The Court: I will give that one. What else?

Mr. Bunn: Now, as far as the complaint instruction, Plaintiff's Exhibit K, as amended, is concerned, we don't think it is proper to give a complaint instruction. Very many of the allegations that are set forth in this complaint instruction are not in dispute. We have never contested many of the charges that are placed in here.

The Court: Doesn't it set out what is in the complaint, however?

Mr. Bunn: Yes, it does. In other words, the plaintiff, Mr. Webb, sets out fully what was in the complaint, and if your Honor reads all of these allegations here, I think it would have a tendency to place some undue emphasis on that instruction.

The Court: Well, the courts have held that to be a good instruction. I will give that. Anything further on the plaintiff's instructions?

Mr. Bunn: Yes, sir. Plaintiff's instruction M, your Honor. I think an instruction of that sort, reading it to

the jury, there would be an inference from that, that the employee can do practically anything he wants on the job, that he has to exercise no care at all as far as
176 his own conduct is concerned.

The Court: That has been passed on. I will give that one.

Mr. Bunn: The last one, your Honor, is Plaintiff's instruction N. In that instruction all of the elements that the jury can consider as far as elements of damage are concerned are set out in full there, and I think that plaintiff's instruction O is unnecessary repetition.

The Court: You are talking about N?

Mr. Bunn: Yes, your Honor. I merely want to call to the Court's attention that N I think fully covers all of the elements of damages, and that instruction O, immediately following, is an unnecessary repetition of the elements of damage.

The Court: What do you say about that?

Mr. Rafferty: That is a stock instruction, merely telling the jury no witness has to give an estimate as to the value of pain and suffering. It is a stock instruction, not covered in the damage instruction.

Mr. Bunn: I think plaintiff's instruction O, the part reading from "it is not necessary" — do you find that in plaintiff's instruction O?

The Court: Yes, I have it.

Mr. Bunn: "It is not necessary that any witness
177 shall have expressed an opinion," I think that if that were merely tacked on to the end of N, that would cover anything that was to be brought out.

The Court: No. I think I will give that one. Anything else?

Mr. Bunn: One other thing. Here, incidentally, are the two motions that you asked me to file, motions at the close of all the evidence. They have been signed now, and I will give a copy to Mr. Rafferty.

The Court: And those will be denied. Now, is that all?

Mr. Bunn: Just one thing, your Honor. I would like to take a moment of the Court's time to discuss the proceedings that we had Monday. I think that if the Court would read the statement taken of the plaintiff about a month after the accident, the Court would find that there

are certain statements in there that would be otherwise highly inadmissible, insofar as it makes reference to the fact that plaintiff has a wife, three small children, two grown children.

On Monday, when the impeaching part of that statement was read — I recall the way the occurrence took place — the Court asked whether or not either one of
178 the parties were going to put this statement that was being read in evidence, and Mr. Rafferty said, "Yes, let us put it in." And, of course, before the jury I was in a position where I could not very well begin a hot contest as to whether or not it should go in.

The Court: Well, but I grant to have the jury hear one thing — I think, as I recall, that is the reason I raised that question. You started to read from it.

Mr. Bunn: Yes, I was reading an impeaching part.

The Court: No. I will have to let that go in, in view of the fact that it did go in by agreement.

Mr. Rafferty: Yes.

The Court: As I recall it. I cannot take that from the jury now. Anything else? Any objection to the defendant's instructions?

Mr. Rafferty: Your Honor, the only objections I had were, I believe, to instructions 1 and 2, and that was because of the fact that they referred to several counts in the original complaint where it had been amended to have only one. I think instruction No. 1 I took up with the Court. Instruction No. 1 of the defendant, in the second line, "was not guilty of the charge". That should be the correction.

The Court: That is right, I guess.

Mr. Rafferty: "Made against it in the complaint,
179 but the burden of proof is upon the plaintiff and plaintiff must prove by a preponderence of the evidence that the defendant was guilty of the" — strike out "one or more" — "the charge of negligence made in plaintiff's complaint."

The Court: That is right. Strike out "one or more." Anything further?

Mr. Rafferty: Defendant's instruction No. 4, your Honor, starting at the end of line 2, "that the defendant was guilty of", the words "one or more of the" should be deleted.

The Court: "Guilty of the act of negligence."
Mr. Rafferty: "Guilty of the act of negligence."
The Court: Yes.
Mr. Rafferty: Beyond that, no objections, your Honor.
The Court: All right, gentlemen.
Mr. Rafferty: Your Honor, we have straightened out the matter of the accuracy of Plaintiff's Exhibit 1. That was the wage scale that the witness testified to. I now offer that in evidence.
The Court: All right.
(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

The Court: After further reflection on the state-
180 ment, if you refer to the statement, I will delete the parts I have marked out there.

Mr. Rafferty: If there is any serious question, I will be agreeable to withdrawing it.
Mr. Bunn: That was your exhibit, Mr. Rafferty.
Mr. Rafferty: Can't we withdraw it by agreement, or do you want it in?
Mr. Bunn: Is that completely in or out?
The Court: I have taken that part out.
Mr. Bunn: The only occasion I would have to refer to it would be as to the impeaching part.
The Court: For whatever purpose you think it is necessary — but this part (indicating) goes out.
Mr. Bunn: All right, your Honor.
Mr. Rafferty: That is all right with me.
The Court: Do you want to leave it in or take it out, with that out? It won't go to the jury anyway.
Mr. Bunn: It won't go to the jury?
Mr. Rafferty: I am not going to refer to it.
Mr. Bunn: The only reference I would have to make is to the impeaching part, and that was the only reason it was ever used in the first place.
The Court: All right. You can make that. I will strike that out. It won't go to the jury. You may refer to it.

(Whereupon the Jury heard the arguments of
181 counsel for the respective parties. Arguments not transcribed.)

The Court: You will now be given the law in this 182 case.

(9)

"Preliminary to your being accepted and sworn to act as jurors in this case you were examined as to your qualifications and competency to serve as jurors in this case. As a part of such examination each of you answered all questions asked you by the Court and suggestions by both counsel for the plaintiff and the defendant. Your answers showed that you were competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith of your answers. The answers you then made to said questions in regard to your competency, qualifications, fairness, lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then and should so remain until you are finally discharged from further consideration of the case. It would be improper for you to disregard these answers that rendered you competent jurors."

(F)

"In considering this case and in passing upon your verdict, you are not required to set aside your own observations and experience as men and women in the affairs 183 of life, but, on the other hand, you have a right, upon consideration of all the evidence in the light of your common observation and experience as men and women in the affairs of life, to say where the truth lies upon any material fact in the case."

(7)

"It is your duty to consider this case in all its bearings and to decide the issues precisely the same as you would if it were a suit between two individuals; and the fact that the plaintiff is an individual, and the defendant is a railroad corporation, should make no difference. A railroad company is entitled to the same fair and unprejudiced treatment in courts of law as individuals would be under like circumstances. In considering and deciding this case you should look solely to the evidence for the facts, and to the instructions for the law, and find your verdict without reference to and without being influenced by the personality of either the plaintiff or the defendant."

(6)

You are instructed that if, in the opening statement or in putting in the evidence, or in argument, counsel for either party has made any statement in reference to
184 the facts in this case not based upon the evidence, you should wholly disregard such statement."

(E)

"The degree of proof required of the plaintiff is that he prove his case by a preponderance of the evidence. This means that upon the questions of fact which the plaintiff is required to prove he must have a greater weight or preponderance of evidence. But this rule does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if you find that the greater weight of the evidence is in his favor."

(1)

"The burden of proof is not upon the defendant in this case to show that it was not guilty of the charge made against it in the complaint, but the burden of proof is upon the plaintiff and the plaintiff must prove by a preponderance of the evidence that the defendant was guilty of the charge of negligence. Preponderance of the evidence means the greater weight of the evidence. You are not allowed to supply any proof or evidence by conjecture, speculation or guess of your own. Unless you find from the evidence in this case that the plaintiff has proved such negligence as charged in the complaint
185 by a preponderance of the evidence, your verdict should be in favor of the defendant."

(K)

"The Court instructs you that in his complaint the plaintiff alleges and charges that on July 2, 1952, he was a member of a train crew employed by the defendant which was engaged in certain switching operations in or near Mount Olive, Illinois; that in the course of his employment he observed a car leaking grain and while going toward a caboose to get some waste material to plug a hole in the bottom of this car, he stepped upon a large

clinker which was imbedded in loose cinders and he was caused to lose his footing and injure his left knee; he alleges that at this time and place the defendant was guilty of negligence or unlawful conduct which directly and proximately caused, or directly and proximately contributed to cause, the accident in question and the plaintiff's injuries in that it allegedly failed to use ordinary care to furnish the plaintiff with a reasonably safe place to work and perform the duties of his employment, and it is charged that as a result of the accident the plaintiff suffered and will continue to suffer severe injuries to his left leg, pain and suffering, and losses of large sums of money.

"The defendant by its answer has denied that it
186 was guilty of any alleged act of negligence as charged by the plaintiff at the time and place in question, which proximately caused or proximately contributed to cause the accident in question, and it alleges that the injuries complained of by plaintiff resulted solely from plaintiff's own negligence, and it denies that it is indebted to the plaintiff in any amount."

"You are instructed that the complaint and answer in this cause contain merely the unsworn statements of the parties and neither prove or tend to prove any allegations contained in them."

(A)

"You are instructed that it appears here without dispute that at the time of the accident both the plaintiff and defendant were engaged in interstate commerce and transportation and, therefore, the rights, duties and liabilities of the parties to this action are governed and controlled solely and exclusively by the Federal Employers' Liability Act of the United States."

(B)

"The Federal Employers' Liability Act of the United States, which is applicable in this case, provides that:

" 'Every common carrier by railroad while engag-
187 ing in commerce between the several states*** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce

for such injuryresulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' "

(C)

"This same law further provides as follows:

" 'That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injuries***resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier.' "

(D)

"The Federal Employers' Liability Act of the
188 United States further provides:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"You are further instructed that the issue of contributory negligence on the part of the plaintiff is what is known as an affirmative defense and the burden of proof thereon is upon the defendant."

(L)

"You are instructed that it was the duty of the defendant to use ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work, and
189 if you find from the evidence that the defendant failed to use ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work, and that such failure, if any, on the part of the defendant to

furnish such place was the direct and proximate cause of the injuries, if any, sustained by the plaintiff, then your verdict should be in favor of the plaintiff and against the defendant."

(M)

"The Court instructs you that an employee has a right to assume that his employer has exercised ordinary care with respect to providing him with a reasonably safe place in which to work."

(5)

"The defendant was not required under the law to furnish the plaintiff a place to work which was absolutely safe. Its duty in that respect was only to exercise ordinary or reasonable care to provide a reasonably safe place for plaintiff to do the work he was doing at the time of the occurrence."

(10)

"You are instructed that negligence is the omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate 190 human affairs, would do, or the doing of something which a prudent and reasonable person would not do."

(2)

"You are instructed that immediately prior to and at the time of the occurrence complained of it was the duty of the plaintiff to exercise reasonable and ordinary care for his own safety. If you find from a preponderance of the evidence that on said occasion plaintiff was negligent and that such negligence, if any, was the sole proximate cause of the injuries, if any, sustained by the plaintiff, you should find the defendant not guilty."

(J)

"The term proximate cause whenever used in these instructions means that cause which of itself or in combination with other causes in natural and continuous sequence unbroken by any efficient intervening cause produced the result complained of and without which the result would not have occurred."

(G)

"The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon
191 which side the preponderance of the evidence is, it is your duty to take into consideration the number of witnesses testifying upon one side or the other of a disputed point; the opportunities of the several witnesses for seeing, or knowing the things about which they testify; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, and from all of these circumstances together with all the other facts and circumstances proved upon the trial, determine upon which side is the greater weight or preponderance of the evidence."

(8)

"You are the sole judges of the facts in the case, the credibility of the witnesses, and of the weight to be given to their testimony. And, in anything that the Court may have said throughout the trial, or anything that the Court may say in these instructions, the Court has not intended and does not now intend to express any opinion upon the facts of the case, on the credibility of the witnesses, or the weight to be given to their testimony. On the other hand, the Court is the sole judge of the law in the case, and it becomes your duty to follow the law as it
192 is given to you by the Court in his instructions."

(12)

"While the law permits the plaintiff in a case to testify as a witness in his own behalf, nevertheless you have the right, in weighing his evidence for the purpose of determining how much credence should be given to it, to take into consideration the fact that he is the plaintiff and is interested in the result of the suit."

(H)

"Under the law the plaintiff is a competent witness to testify in his own behalf in this suit. You should not disregard the plaintiff's testimony merely because he is the plaintiff and interested in your verdict, but you should

consider his testimony in connection with all the evidence in the case, and give his testimony such weight and credit as you believe it entitled to from all the facts and circumstances in evidence."

(P)

"You are instructed that certain mortality tables were received in evidence tending to show the expectation of life of the plaintiff. These tables are not conclusive
193 or binding upon you. The plaintiff may die before his expectancy has been reached, and on the other hand, he may live longer than his expectancy. These tables were received as an aid to the jury in determining the probable expectancy of the life of the plaintiff, and, if you find that the plaintiff's injuries, if any, were permanent, you are to give them such weight as you find they are entitled to receive in the light of your commonsense and experience. The expectancy of life should not be used as a factor by merely multiplying the years of expectancy by the annual earnings. The award of damages for loss of future earnings must be reduced to its present cash value and adequate allowances must be made for the earning power of money. You are entitled to consider all factors or circumstances which might tend to increase or decrease the pecuniary loss."

(N)

"You are instructed that if you find for the plaintiff you will be required to determine the amount of his damages. In determining the plaintiff's damages, if any, you should determine the amount of damages suffered by him directly and proximately in consequence of such injuries, if any, and you should find the amount of
194 damages to be such a sum of money as will fully, fairly, justly and adequately compensate him for such injuries. In determining the amount of such damages, if any, it is your duty to take into consideration his age, earning capacity, and the character, extent and severity of such injuries, if any, the pain and suffering, if any, that he has endured up to the present time, and the pain and suffering, if any, that it is reasonably certain he will endure in the future; you will take into consideration such disability, if any, as he has suffered up to the present

time and such disability, if any, as it is reasonably certain he will suffer in the future therefrom; you should take into account and consideration the extent, if any, to which he has been incapacitated to work and earn money in consequence of such injuries, provided that you find from the preponderance of the evidence that he has been incapacitated to work and earn money, and the amount of earnings, if any, which plaintiff has lost from the time he was injured up to the present time directly and approximately in consequence of his injuries, and the amount of earnings, if any, it is reasonably certain from the preponderance of the evidence he will lose in the future directly or proximately in consequence of said injuries,
if any, so far as any of the above mentioned elements
195 of damage, if any, have been alleged in the plaintiff's complaint and proven by a preponderance of the evidence; and thereby the jury will determine from the evidence what sum will be a fair and just compensation for such injuries, if any, if they find a verdict for the plaintiff."

(4)

"You are further instructed that if you find from a preponderance of evidence that defendant was guilty of the act of negligence charged in the plaintiff's complaint and that such negligence, if any, was a proximate cause of such accident, but if you further find that with respect to such accident plaintiff was also negligent and that his negligence, if any, contributed to causing his injuries, then you should diminish plaintiff's damages in proportion to the amount of negligence, if any, attributable to the plaintiff."

(O)

"The Court instructs you that if, under the evidence and instructions of the Court, you find the defendant guilty and that the plaintiff has sustained damages by reason of physical injury and pain and suffering, if any,
by him sustained as a natural, direct and proximate
196 result of being injured in the accident in question,
then, to enable you to estimate the amount of such damages, if any, caused by physical injuries, pain and suffering, it is not necessary that any witness should

have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved by the evidence, considering these in connection with their knowledge, observation and experience in ordinary affairs of life."

(3)

"You should not consider the question of damages in this case until you have first determined whether or not the defendant is liable for the loss and damage claimed by the plaintiff, and if you find from the evidence and the instructions of the Court that the defendant is not liable to the plaintiff, then you will have no occasion at all to consider the question of damages. The fact that the Court has given any instructions on the subject of plaintiff's damages, if any, or that defendant's counsel have discussed such subject, is not to be taken by you as any inimation on the part of the Court or any admission on the part of the defendant that the defendant is liable for the loss and damage charged in the complaint."

(11)

"Sympathy for the injuries and disabilities of the 197 plaintiff, if any, from whatever source they may come, should have no influence upon you in determining whether or not the defendant is liable or, if liable, control in any way your verdict. Both the question of liability and that of damages are matters to be determined from the evidence and under the instructions of the Court. Prejudice, sympathy or any side matters should not affect your judgment. In other words, it is your duty to give every question in the case a calm, careful and conscientious consideration, uninfluenced by sympathy, or any consideration other than the evidence and the law as given to you in these instructions."

Your first duty in going into the jury room will be to select a foreman. Whichever verdict you sign, have your foreman sign at the top and the rest of you underneath.

If you find the defendant guilty, you will all sign this form:

"We the jury find the defendant guilty and assess the plaintiff's damages at the sum of dollars and cents."

Fill that in. If you find the defendant not guilty, you
198 will all sign this form:

"We the jury find the defendant not guilty."

The Court: Marshals be sworn.

The Clerk: You and each of you do solemnly swear that as bailiffs in charge of this jury you will provide for them a suitable and convenient place for their deliberations, that you will allow no one to speak to them or tamper with them, nor will you speak to them yourselves, except to ascertain whether they have agreed upon a verdict. So help you God.

The Court: All right, you may retire.

(Whereupon the jury retired to consider of their verdict.)

The Court: Do you gentlemen agree on a signed and sealed verdict in case the jury does not come in during court hours?

Mr. Bunn: Yes.

Mr. Rafferty: Yes.

The Court: If you desire, if it is sealed, if they come in during court hours or while the Clerk is here, he will open it, and if you will leave your cards, he will tell you what the verdict is. Is that agreeable to you?

Mr. Rafferty: Yes.

199 The Court: For the record, it is, I take it, agreeable to you, Mr. Bunn?

Mr. Bunn: Yes, sir.

The Court: Also, in order to keep a date on this, if a motion is made for new trial by either side, I will set the date for March 11, 1955, at 10:00 o'clock.

The Clerk: Signed and sealed verdict is agreed to, and it is agreed to waive the polling of the jury?

Mr. Rafferty: Yes.

Mr. Bunn: Yes, sir.

* * (Caption No. 53 C 1687) * *

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Certificate

I hereby certify that the foregoing 182 typewritten
200 pages, numbered from 1 to 182, inclusive, are a true and accurate transcript of my original official short-

hand notes taken of the proceedings had upon the trial of the above entitled cause before Honorable Philip L. Sullivan, one of the Judges of said Court, and a jury, on February 18, 21 and 23, 1955, and contain all of the oral proceedings had upon the trial of said cause, with the following exceptions:

1. Jury voir dire
2. Opening statements
3. Arguments.

Alfred H. Frederick,
Official Court Reporter
United States District Court
Northern District of Illinois.

April 4, 1955.

201 And afterwards on, to wit, the 26th day of April, 1955 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had On February 18, 1955, Before The Honorable Philip L. Sullivan, Judge, in words and figures following, to wit:

203 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 53 C 1687) * *

TRANSCRIPT OF CERTAIN PROCEEDINGS

had upon the trial of the above-entitled cause before the Honorable Philip L. Sullivan, one of the judges of said court, and a jury, at Chicago, Illinois, on February 18, 1955, namely, the opening statement by counsel for the defendants.

Appearances:

Mr. Robert J. Rafferty,
On Behalf of the Plaintiff;
Mr. William F. Bunn,
On Behalf of the Defendant.

204 OPENING STATEMENT ON BEHALF OF DEFENDANT.

By Mr. Bunn:

May it please the Court, Counsel, ladies and gentlemen of the jury:

I just wish to caution you again at this time that, as Mr. Rafferty brought out very clearly, anything Mr. Rafferty or myself might say at this time is not to be considered by you as evidence. Your final decision, as far as this case is concerned, will be determined by the evidence that you hear from the witnesses or from the exhibits that are introduced in evidence.

Mr. Rafferty pretty clearly brought out the factual situation as far as the general location is concerned. Mount Olive is a town not too distant from East St. Louis. It is a small town.

The Plaintiff, Mr. Webb, at the time of the occurrence in question, was on this run from East St. Louis to Clinton, Illinois. Now, Mr. Webb had been, I think the evidence will show, a member of these crews that were going from East St. Louis to Clinton and return for some six or seven years at a minimum.

At Mount Olive, I think the evidence will show, Mr. Webb was accustomed to working around the house track switch, which is approximately the location where he fell.

He had been working there practically every day. Part
205 of Mr. Webb's duty was to handle the switches, and take cars off the track and bring them on to the main track, or set them out on side tracks. The side track is the location of the accident in question.

Now, Mr. Webb and the rest of the crew, I think the evidence will show, were working their train near the house track switch, and that Mr. Webb gave a signal to the engineer of the train to move forward after Mr. Webb had uncoupled one of the cars. At that moment he turned, started to walk to his right. At the time he was looking at the ground, I think the evidence will show. Mr. Webb saw nothing. The next thing Mr. Webb knew is that he fell. He never saw a clinker. I think the evidence will

show that after he fell, after he had landed on the ground, he looked around, at that time saw this clinker, which was just barely discernible when he first saw it.

Now, I think that the evidence will, in addition, show that none of the members of the train crew saw Mr. Webb actually fall. As far as the cinder is concerned, Mr. Webb cast the cinder away. So the only testimony you will hear about the cinder, its size, its presence, where it was, is the testimony of Mr. Webb, because the cinder was
206 thrown away.

Now, as Judge Sullivan pointed out, Mr. Webb, through his attorney, Mr. Rafferty, has brought suit against his employer under the Federal Employers Liability Act, and Judge Sullivan pointed out to you several charges of negligence Mr. Webb was making against his employer; and we in turn contend that the cause of this accident, if it was not solely Mr. Webb's fault he, at least, contributed as much as Illinois Central would have. We frankly did not think that we had failed to do anything that the law required us to do toward keeping the place Mr. Webb was working as a safe place to work. As to the law on that subject, Judge Sullivan, I believe, at the close of the case, will instruct you what our duty is as far as the place where these men work.

Now, Mr. Rafferty pointed out following this occurrence, Mr. Webb, the Plaintiff, received treatment by the local doctors down near Mount Olive, Litchfield and Clinton, and then subsequently came up here to Chicago, where he was treated at the Illinois Central Hospital. He was ultimately operated on to remove cartilage in his leg, and in that space of time, the treatment he received, that was done at the expenses of the company, not at the expense of Mr. Webb.

207 Mr. Rafferty: Object, your Honor, because that is not the fact. The fact is that the Illinois Central employees contribute to their own hospital plan and pay as much as the company does for any medical expense.

Mr. Bunn: We will prove that point, your Honor.

Ladies and gentlemen, we will bring in men who have worked on that roadbed, men who have constructed or repaired or replaced the ties around the location of this

house track switch, and the men that inspect the track along that location, to give you ladies and gentlemen an understanding of just what the Illinois Central does to try to protect the men.

As far as the clinker is concerned, I think the evidence will show that Mr. Webb had never seen any large clinkers in that area prior to the accident; and since it happened, according to Mr. Rafferty's statement, two or three weeks after this alleged construction work was done, he apparently had never seen it during that two or three week period, even though he had been over it every day.

Of course, in any case like this, you know there are two sides to every question, so I will only ask at this time that you keep an open mind until all the evidence is in, and then at the close of the evidence I will ask you to
208 bring in a verdict of not guilty.

I thank you.

209 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 53 C 1687) * *

CERTIFICATE

I hereby certify that the foregoing 6 type-written pages, numbered consecutively from 1 to 6, inclusive, are a true and accurate transcript of my original official shorthand notes taken of the opening statement by Counsel for Defendant at the trial of the above-entitled cause before Honorable Philip L. Sullivan, one of the Judges of said Court and a jury on February 18, 1955.

/s/ *Alfred H. Frederick*
Alfred H. Frederick,
Official Court Reporter
United States District Court,
Northern District of Illinois.

April 25, 1955.

210 And afterwards on, to wit, the 10th day of May, 1955 there were filed in the Clerk's office of said Court cer-

tain Plaintiff's Exhibits 1 and 2, and Defendant's Exhibits 1, 2, 3 and 4, in words and figures following, to wit:

211 Plaintiff's Exhibit No. 1.

July 1952	Irregular Frt.	$12.55 per day
Escalator Scale —		
Oct. 1952	Irregular Frt.	12.71 per day
Jan. 1953	Irregular Frt.	12.95 per day
Apr. 1953	Irregular Frt.	12.71 per day
July 1953	Irregular Frt.	12.71 per day
Oct. 1953	Irregular Frt.	12.95 per day
Permanent Wage —		
Dec. 1, 1953	Irregular Frt.	13.35 per day
July 1952	Local Frt.	$13.02 per day
Escalator Scale —		
Oct. 1952	Local Frt.	13.18 per day
Jan. 1953	Local Frt.	13.42 per day
Apr. 1953	Local Frt.	13.18 per day
July 1953	Local Frt.	13.18 per day
Oct. 1953	Local Frt.	13.42 per day
Permanent Wage —		
Dec. 1, 1953	Local Frt.	13.82 per day

	Thru	Loc.
1949	10.59	11.06
1950	11 50 10.99	11.46
1951	4-51 12.07	12.54

Plaintiff's Exhibit No. 2.

Clinton, Ill., August 7, 1952.

212 Statement of J. W. Webb, Conductor and Brakeman:

I am 46 years of age, married, and live 814 E. Macon Street, Clinton, Illinois. I have been in the service of the ICRR Co. since June 1925. My social security No. is 709-01-7771. I carry group insurance but no other accident insurance.

I was injured while on duty as Flagman on local freight train No. 68 at Mt. Olive, Illinois at 11:05 AM, July 2, 1952. The weather was fair at the time. We had eight cars in our train and on arrival at Mt. Olive stopped on the main then head toward the siding and backed the whole train toward the house track, where we coupled the rear to a box car and pulled it and the train out of the house track and then backed toward the main with all of them. We stopped with the engine and one car on the house track switch. I cut behind the head car in the train, told the head brakeman to pick up two cars from the L&M connection

and that I would go back and plug a hole in the bottom of a car of wheat which was leaking badly. As I started to walk to the caboose to get some waste to plug the hole with, I took one step and stepped on a cinder burried in the loose cinders about a foot from the end of the ties. When I stepped on this cinder it threw me off balance, caused me to fall and I injured my left knee as I fell. This happened about 15 feet south of the house track switch on the east side of the house track. This track had been worked on shortly before this by the trackmen and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in the loose cinders around it so that it was not discernible from the rest of the small loose cinders. It looked like the surfance was level and good enough footing but this cinder being solid in the loose cinders caused my foot to turn as I stepped on it, turned my foot and caused me to fall so that I injured the cartilege in my knee as I fell. It pained me severely when it happened, but I managed to go ahead and plug the hole in the wheat car and then I got on the caboose and rode the train on in to Clinton in the caboose. Enroute, while our train was doing work at Litchfield, I went to Company Surgeon Sihler there for attention. He told me that I had injured the cartilege in my knee and suggested that I go on to Clinton and report to the Company Doctor there which I did. I was attended by Dr. Sinow at Clinton, remained under his care for two weeks and he then sent me to the Illinois Central hospital in Chicago. I went to Chicago on July 17 and remained in the hospital there until July 28 when I was released back to Dr. Sinow because Dr. Sinow could give me the same treatment that I was getting in Chicago. I am still under the care of Dr. Sinow who has since put my left knee and left leg in a cast which I am wearing now. I do not know what the outcome of my injury will be nor when I will be released by Dr. Sinow. The injury to my left knee was the only injury I received in this accident. My rate of pay is $13.02 per hundred miles. My earnings on an average will amount to from $500 to $600 per month. Brakeman C. J. Stephenson was close to me but walking away from me when this accident happened.

I have read the foregoing and it is correct.

J. W. WEBB.

Witnessed:
J. R. Mann

DEFENDANT'S EXHIBIT 1.

214 Defendant's Exhibit No. 2.

STATEMENT

ILLINOIS CENTRAL HOSPITAL

5800 Stony Island Avenue
Chicago 37, Illinois

February 21, 1955

Illinois Central Railroad for services furnished

Mr. John W. Webb,
814 E. Macon St.,
Clinton, Illinois.
Room: 341

ALL CHARGES PAYABLE WEEKLY IN ADVANCE
PHYSICIAN'S CHARGES NOT INCLUDED IN THIS BILL

Date	Item	Charge	Credit	Balance Due
9-9-52	29 days room and board @			
4:30 PM	$8.50 per day	246.50		
	Laboratory service	10.00		
Thru	X-ray service	8.50		
	Medications	12.83		
10-8-52	Dressings	2.45		
3:00 PM	Operating room	30.00		
	Anesthesia	15.00		
	Physical therapy	42.00		
		$367.28		00

215 Defendant's Exhibit No. 3.

STATEMENT

ILLINOIS CENTRAL HOSPITAL

5800 Stony Island Avenue
Chicago 37, Illinois

February 21, 1955

Illinois Central Railroad for services furnished

Mr. John W. Webb,
814 E. Macon St.,
Chicago, Illinois.
Room: 361

ALL CHARGES PAYABLE WEEKLY IN ADVANCE
PHYSICIAN'S CHARGES NOT INCLUDED IN THIS BILL

Date	Item	Charge	Credit	Balance Due
7-17-52	11½ days room and board @			
9:30 AM	$10.25 per day	117.88		
	Laboratory service	8.00		
Thru	Physical Therapy	25.00		
	X-ray service	16.00		
7-28-52		$166.88		00
4:00 PM				

216 Defendant's Exhibit No. 4.

CHESTER C. GUY, M.D.

5800 Stony Island Ave.
Chicago 37, Ill.

Hours 3 to 5
Mon. - Tues. - Thurs. - Fri:

MIdway 3-9200
October 1, 1952

Illinois Central Railroad
Chicago, Illinois

IN ACCOUNT WITH

Professional services furnished
case of John Wesley Webb
ICRR Conductor
Clinton, Ill.
Paid $300

217 And on, to wit, the 21st day of February, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain five (5) motions in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
218 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the Court to instruct the jury to find the defendant not guilty for the following reasons:

(a) The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Compiaint;

(b) The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;

(c) The evidence affirmatively shows that the injuries complained of resulted solely from the plaintiff's negligent conduct at the time and place of the occurrence in question;

and with this motion tenders to the Court, separately and distinctly from any other instructions tendered in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty."

219 with the request that the Court mark that instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

220 The Court instructs the jury to find the defendant not guilty.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
221 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to instruct the jury to find the defendant not guilty as to paragraph 6(a), wherein it is charged that the defendant was negligent in failing to use ordinary care to furnish the plaintiff with a reasonably safe place to work and to perform the duties of his employment, and with this motion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(a) of the plaintiff's complaint,"

with the request that the Court mark said instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

The Court instructs the jury to find the defendant
222 not guilty of the charge in paragraph 6(a) of the plaintiff's Complaint.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
223 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F.

Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to instruct the jury to find the defendant not guilty as to paragraph 6(b), wherein it is charged that the defendant was negligent in placing a large clinker among the cinders constituting its roadbed and thereby created a hazaradous condition for its employees working upon or about its aforementioned tracks, and with this motion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

> "The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(b) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

The Court instructs the jury to find the defendant
224 not guilty of the charge in paragraph 6(b) of the plaintiff's Complaint.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 53 C. 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
225 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the Court to instruct the jury to find the defendant not guilty as to paragraph 6(c), wherein it is charged that the defendant was negligent in repairing or reconstructing its aforementioned roadbed, failing to inspect the materials used for said purpose, and carelessly and negligently allowed and permitted a large clinker to be placed among loose cinders adjacent to the aforementioned tracks, and with this mo-

tion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(c) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

The Court instructs the jury to find the defendant
226 not guilty of the charge in paragraph 6(c) of the plaintiff's Complaint.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
227 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the Court to instruct the jury to find the defendant not guilty as to paragraph 6(d), wherein it is charged that the defendant was negligent in the promises and violated established rules, customs and practices, and with this motion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(d) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant.

The Court instructs the jury to find the defendant
228 not guilty of the charge in paragraph 6(d) of the plaintiff's Complaint.

And on the same day to wit, on the 21st day of
229 February, 1955, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit:

230

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

This being the day to which this cause was continued for further trial again come the parties by their counsel and the Jury impaneled and sworn herein also come and the trial proceeds and at the close of the plaintiff's case the defendant by its counsel enters its motion for a directed verdict and said motion hereby is taken under advisement and the trial proceeds and at the close of defendant's case the Court being fully advised it is

Ordered that the defendant's motion for a directed verdict made at the close of plaintiff's case be and the same hereby is denied and the hour of adjournment having arrived it is

Further Ordered that this cause be and the same hereby is continued to February 23, 1955 at 10:00 A.M. for further trial

231 And afterwards on, to wit, the 23rd day of February, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motions in words and figures following, to wit:

232

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

Now comes the defendant, Illinois Central Railroad Company, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at

the close of all the evidence offered on behalf of both parties, and moves the Court to instruct the jury to find the defendant not guilty for the following reasons:

(a) The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;

(b) The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;

(c) The evidence affirmatively shows that the injuries complained of resulted solely from the plaintiff's negligent conduct at the time and place of the occurrence in question;

and with this motion tenders to the Court, separately and distinctly from any other instructions tendered in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty."

233 with the request that the Court mark that instruction "Given" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant.

234 The Court instructs the jury to find the defendant not guilty.

235

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, Illinois Central Railroad Company, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of both parties and moves the Court to instruct the jury to find the defendant not guilty as to paragraph 6 (a), wherein it is charged that the defendant was negligent in failing to use ordinary care to furnish the plaintiff with a reasonable safe place to work and to perform the duties of his employment, and with this motion tenders to the Court,

separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6 (a) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "Given" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant.

236 The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(a) of the plaintiff's Complaint.

237 And on the same day to wit, on the 23rd day of February, 1955 being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entries, to wit:

238

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

This being the day to which this cause was continued for further trial again come the parties by their counsel and the Jury impaneled and sworn herein also come and the trial proceeds and at the close of all the evidence the defendant by its counsel enters herein its motion for a directed verdict and upon due consideration the Court being fully advised in the premises it is

Ordered that said motion be and the same hereby is denied and the trial proceeds and the Jury now having heard all the evidence adduced by the parties, the arguments of counsel and instructions of the Court retire to their rooms with sworn Marshals to consider of their verdict and by agreement of the parties by their counsel it is

Ordered that when the Jury shall have arrived at a verdict they shall sign and seal the verdict, deliver it to the

Marshal and separate and polling of the Jurt is waived

239

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

This day again come the parties by their counsel and the Jury impaneled and sworn herein also come and render their verdict and upon their oath do say:

"We, the Jury, find the defendant guilty and assess the plaintiff damages at the sum of Fifteen thousand Dollars and no cents ($15,000.00)."

and it is

Ordered that said verdict be filed and that the Jury be and they hereby are discharged from further service herein and it is

Ordered and Adjudged that the plaintiff John W. Webb do have and recover of and from the defendant Illinois Central Railroad Company his damages herein in the sum of fifteen thousand dollars ($15,000.00), together with the costs and charges in this behalf expended and it is

Further Ordered that the motion for a new trial be and the same hereby is set for hearing on March 11, 1955 at 10:00 A.M.

240 And on the same day to wit, the 23rd day of February, 1955 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

241 * * (Caption—No. 53-C-1687) * *

242 And afterwards on, to wit, the 4th day of March, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

243

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Motion

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, within ten days after the entry of verdict and judgment herein, and pursuant to Rule

50(b) of the Rules of Civil Procedure, moves the Court to set aside said verdict and judgment thereon and to enter judgment in its favor in accordance with its motions for a directed verdict submitted at the close of the plaintiff's case and submitted at the close of all the evidence; or, in the alternative, the defendant prays the Court to grant a new trial herein, and as grounds for the same shows to the Court as follows:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and the evidence.
4. The verdict is contrary to the manifest weight of the evidence.
5. The damages awarded by the jury are excessive as a matter of fact.
6. The damages awarded by the jury are excessive as a matter of law.
7. The evidence fails to show that the defendant 244 was guilty of any of the charges of alleged negligence contained in the complaint.
8. The evidence fails to prove the cause of action alleged in the complaint.
9. The Court should have directed a verdict for the defendant at the close of the plaintiff's evidence in accordance with the general motion tendered by the defendant to find the defendant not guilty.
10. The Court should have given to the jury the written instructions to find the defendant not guilty as to each of the several charges of alleged negligence contained in the complaint, which instructions were tendered at the close of the plaintiff's evidence and accompanied by proper written motions requesting that said instructions and each of them be marked "Given."
11. The Court should have directed a verdict for the defendant at the close of all the evidence in accordance with the general motion tendered by the defendant to find the defendant not guilty.
12. The Court should have given to the jury the written instruction to find the defendant not guilty as to the charge of negligence in the complaint, which instruction was tendered at the close of all the evidence and accompanpanied by proper written motion requesting that said instruction be given and read to the jury.

13. The Court erred in admitting improper evidence offered by the plaintiff.

14. The Court erred in refusing to admit certain proper evidence offered by the defendant.

15. The Court erred in marking "Given" and reading to the jury each and all of the given instructions tendered on behalf of the plaintiff.

245 16. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered A, which instruction was as follows:

"The jury is instructed that it appears here without dispute that at the time of the accident, both the plaintiff and defendant were engaged in interstate commerce and transportation and, therefore, the rights, duties and liabilities of the parties to this action are governed and controlled solely and exclusively by the Federal Employers' Liability Act of the United States."

17. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered B, which instruction was as follows:

"The Federal Employers' Liability Act of the United States, which is applicable in this case, provides that:

Every common carrier by railroad while engaging in commerce between the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

18. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered C, which instruction was as follows:

"This same law further provides as follows:

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injuries * * * resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

19. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered K, which instruction was as follows:

246 "The Court instructs the jury that in his complaint the plaintiff alleges and charges that on July 2, 1952, he was a member of a train crew employed by the defendant which was engaged in certain switching operations in or near Mount Olive, Illinois; that in the course of his employment he observed a car leaking grain and while going toward a caboose to get some waste material to plug a hole in the bottom of this car, he stopped upon a large clinker which was imbedded in loose cinders and he was caused to lose his footing and injure his left knee; he alleges that at this time and place the defendant was guilty of negligence or unlawful conduct which directly and proximately caused, or directly and proximately contributed to cause, the accident in question and the plaintiff's injuries in that it allegedly failed to use ordinary care to furnish the plaintiff with a reasonably safe place to work and to perform the duties of his employment, and it is charged that as a result of the accident the plaintiff suffered and will continue to suffer severe injuries to his left leg, pain and suffering, and losses of large sums of money.

"The defendant by its answer has denied that it was guilty of any alleged act of negligence as charged by the plaintiff at the time and place in question which proximately caused or proximately contributed to cause the accident in question, and it alleges that the injuries complained of by plaintiff resulted solely from plaintiff's own negligence, and it denies that it is indebteed to the plaintiff in any amount.

"You are instructed that the complaint and answer in this case contain merely and unsworn statements of the parties and neither prove or tend to prove any allegations contained in them."

20. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered M, which instruction was as follows:

"The Court instructs the jury that an employee has a right to assume that his employer has exercised ordinary care with respect to providing him with a reasonably safe place in which to work."

21. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered O, which instruction was as follows:

"The Court instructs the jury that if, under the evidence and instructions of the Court, you find the defendant guilty and that the plaintiff has sustained damages by reason of physical injury and pain and suffering, if any, by him sustained as a natural, direct and proxi-
247 mate result of being injured in the accident in question, then, to enable the jury to estimate the amount of such damages, if any, caused by physical injuries, pain and suffering, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved by the evidence, considering these in connection with their knowledge, observation and experience in ordinary affairs of life."

22. The Court erred in submitting the case to the jury.

23. The evidence shows that the occurrence in question resulted from causees over which the defendant, in the exercise of reasonable car had no control.

24. The evidence shows hat plaintiff was guilty of negligence, which was the sole and proximate cause of his injuries.

25. The Court erred in entering judgment for the plaintiff.

26. The Court erred in refusing to enter judgment for the defendant in accordance with its motion to set aside the verdict and judgment and to enter judgment for the defendant.

27. The Court erred in receiving into evidence certain improper evidence offered by the plaintiff.

28. Defendant was prejudiced by improper argument on the part of plaintiff's counsel.

29. The Court erred in making certain improper and prejudicial remarks in the presence of the jury.

30. The facts show that the occurrence in question was an accident which did not result from negligence on the part of the defendant.

31. The verdict of the jury as to both liability and damages is a result of bias and prejudice and indicates the judgment of the jury was overcome by sympathy for the plaintiff.

248 32. And for other good and sufficient reasons appearing in this cause.

Illinois Central Railroad Company
Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant
By Charles I. Hopkins, Jr.
An attorney of record

Received a Copy of the above and foregoing Motions this 4th day of March, A. D. 1955.
Robert J. Rafferty
Attorney for Plaintiff
By /s/ *Mary McDonald*

249 And afterwards, to wit, on the 11th day of March, 1955 being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit:

250

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

This cause coming on for hearing on the motion of the defendant for a new trial, etc., come the parties by their counsel and on motion of the defendant by its counsel it is

Ordered that leave be and hereby is granted to the defendant to withdraw Point 29 from his motion for a new trial, etc., and the Court now having heard the arguments of counsel it is

Further Ordered that the plaintiff shall present an order on March 14, 1955 at 10:00 A.M. pursuant to the Court's ruling

251 And afterwards, to wit, on the 14th day of March, 1955 being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit:

252

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

Order

This cause this day coming on to be heard on the motions of the defendent after verdict and judgment herein, and the Court having considered said motions and heard the arguments of counsel, and being fully advised in the premises;

It is, therefore, ordered that the motions of the defendant to set aside the verdict and judgment thereon and to enter judgment in its favor in accordance with its motions for a directed verdict submitted at the close of the plaintiff's case and submitted at the close of all of the evidence, and the defendant's motion for a new trial herein be and the same are hereby overruled and denied.

Enter: */s/ Philip L. Sullivan,*

March 14, 1955

Judge

253 And afterwards on, to wit, the 7th day of April, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto), in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

NOTICE OF APPEAL

254 Notice is hereby given that the Illinois Central Railroad Company, a corporation, defendant appellant, hereby appeals to the Court of Appeals for the Seventh Circuit from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, heretofore made and entered in this cause on the 23rd day of February, A.D. 1955; and from the final order of said Court heretofore made and entered in this cause on the 14th day of March, A.D. 1955, overruling the defendant appellant's motion for judgment in its favor,

in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, and overruling said defendant-appellant's alternative motion for a new trial.

Illinois Central Railroad
By Herbert J. Deany
Robert S. Kirby
William F. Bunn
Its Attorneys

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

Certificate of Mailing

I, Roy H. Johnson, Clerk of the United States Dis-
255 trict Court for the Northern District of Illinois, do hereby certify that on April 7, 1955, in accordance with Rule 73(b) of the Federal Rules of Civil Proceedure, a copy of the foregoing Notice of Appeal was mailed to:

Robert J. Rafferty
30 North La Salle Street
Ra-6-1892
Chicago, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 7th day of April, 1955.

Roy H. Johnson
Clerk

(Seal) By Gizella Buther
Deputy Clerk

And afterwards, to wit, on the 11th day of April,
256 1955, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 53-C-1687) * *

Order

On motion of the attorneys for defendant-appellant
257 Illinois Central Railroad Company, a Stipulation as to Supersedeas Bond to be Filed herein having been

filed and the Court being fully advised in the premises:

Therefore, it is Ordered and Adjudged that defendant-appellant Illinois Central Railroad Company be allowed ten (10) days within which to file a supersedeas bond in the amount of Seventeen Thousand Dollars ($17,000.00), and that the defendant appellant deposit with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, Seventeen Thousand Dollars ($17,000.00) of face value of United States Treasury Bonds as surety for said supersedeas bond in lieu of a signatory surety for said supersedeas bond, said United States Treasury Bonds to be 2-3/8%, due June 15, 1958, and bearer in form; the supersedeas bond in the usual form to be executed and filed by defendant appellant.

It is Further Ordered and Adjudged that the receipt of the Clerk of this Court that he has received from defendant appellant the United States Treasury Bonds shall be attached to and made a part of the supersedeas bond to be executed by defendant appellant.

It is Further Ordered and Adjudged that execution
258 in this suit be stayed pending the hearing and determination of the appeal herein and the coming down to this Court of the mandate of the United States Court of Appeals for the Seventh Circuit, upon the filing by the defendant appellant of the supersedeas bond for Seventeen Thousand Dollars ($17,000.00), with the attached receipt of the Clerk of this Court for the deposit of the Seventeen Thousand Dollars ($17,000.00) of face value of United States Treasury Bonds, as hereinbefore ordered.

Enter:

John P. Barnes
Judge

Dated: April 11, 1955.

And afterwards on, to wit, the 13th day of April,
259 1955 came the Plaintiff-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Appearance in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—N 53-C-1687) * *

Notice of Appearance

Notice is hereby given that the name of the Appellee

260 in the subject case is John W. Webb; that the name and address of his attorney is Robert J. Rafferty, 30 North LaSalle Street, Chicago 2, Illinois.

Robert J. Rafferty
Attorney for Plaintiff Appellee,
John W. Webb

Received a copy of the above
Notice of Appearance this 12th
day of April, 1955.
Herbert J. Deany
Robert S. Kirby (Signed)
William F. Bunn
Attorneys for Defendant,-Appellant

And afterwards on, to wit, the 15th day of April, 261 1955 there was filed in the Clerk's office of said Court a certain Supersedeas Bond in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Supersedeas Bond

Know all Men by These Presents, that the Illinois 262 Central Railroad Company, a corporation, and United States Treasury Bonds at the face value of Seventeen Thousand Dollars ($17,000.00) payable to bearer and deposited with the Clerk of this Court pursuant to order of this Court, to be held and deposited as security to this Bond, subject to the terms and conditions as hereinafter set forth, are held and firmly bound unto John W. Webb in the sum of Seventeen Thousand Dollars ($17,000.00), for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally and firmly by these presents.

Witness its hand and seal this 15th day of April, A.D. 1955.

Whereas, on the 23rd day of February, 1955, a judgment in the sum of Fifteen Thousand Dollars ($15,000.00) was rendered in the above-entitled action in favor of the above-named obligee, and the said Illinois Central Railroad Company, a corporation, has duly filed a notice of appeal from

said judgment to the United States Court of Appeals for the Seventh Circuit; and

Whereas, the said Illinois Central Railroad Company, a corporation, desires a stay of all proceedings in the above-entitled cause until the determination of the said appeal.

Now, Therefore, the condition of this bond is such that if the said Illinois Central Railroad Company, a cor-
263 poration, as appellant, shall prosecute its appeal with effect and shall satisfy the said judgment in full, together with costs, interests and damage for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and costs, interest and damage as may be adjudged and awarded by the Court of Appeals for the Seventh Circuit, then this obligation to be void, otherwise to remain in full force and effect.

Illinois Central Railroad Company,
a Corporation, (Principal)

(Seal)

By J. H. Wright
Vice President

Attest:
A. B. Huttig
Assistant Secretary

Approved: April 15, 1955
John P. Barnes
Judge

State of Illinois }
County of Cook } ss

I, Olive O'Reilly, a Notary Public, in and for said
264 County in the State aforesaid, do hereby certify that J. H. Wright is personally known to me to be Vice President of the Illinois Central Railroad Company, a corporation, and A. B. Huttig is personally known to me to be the Assistant Secretary of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, and they appeared before me this day in person and severally acknowledged that as such Vice President and Assistant Secretary, they signed and delivered the said instrument as Vice President and Assistant Secretary of said corpora-

tion and caused the corporate seal of said corporation to be affixed thereto, as their free and voluntary act, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 15th day of April, A.D. 1955.

(Seal)

Olive O'Reilly
Notary Public

Received a Copy of the foregoing document this 15th day of April, A. D. 1955.

Robert Rafferty (Signed)
Attorney for Plaintiff-Appellee

Received the following list of securities this 15th
265 day of April, A.D. 1955, at Chicago, Illinois, being 2-3/8% United States Treasury Bonds, with maturity date of June 15, 1958, and payable to bearer:

72447 for $10,000.00 with coupons 6 to 12 incl.
14875 for $ 5,000.00 with coupons 6 to 12 incl.
30198 for $ 1,000.00 with coupons 6 to 12 incl.
30199 for $ 1,000.00 with coupons 6 to 12 incl.

held as security to the attached Bond pursuant to order of the United States District Court for the Northern District of Illinois, Eastern Division, heretofore entered in said cause.

Roy H. Johnson
Clerk of the United States District Court, Northern District of Illinois, Eastern Division

And on the same day to wit, on the 15th day of
266 April, 1955, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * * (Caption—No. 53-C-1687)

It Is Ordered by the Court that supersedeas bond
267 in the sum of Seventeen Thousand Dollars ($17,000.00) be and the same hereby is approved

And afterwards on, to wit, the 18th day of April,
268 1955 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points And Designation Of Record in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Statement of Points

Defendant-Appellant above named states that the
269 points on which it intends to rely on this appeal are as follows:

1. The court erred in submitting the case to the jury.
2. The court erred in giving certain instructions on behalf of plaintiff.
3. The court erred in holding that there was any evidence reasonably tending to prove any of the charges of negligence.
4. The court erred in holding that there was any evidence reasonably tending to show that the negligence charged was the proximate cause of the injury complained of.
5. The court erred in failing to grant a remittitur because of the excessive amount of the verdict.
6. The court erred in failing to grant a remittitur because the record shows that the plaintiff was guilty of contributory negligence as a matter of law.
7. The court erred in submitting the case to the jury because the record shows that the sole proximate cause of plaintiff's injury was his own negligence.

270 8. The court erred in entering the judgment against defendant.

Illinois Central Railroad Company
Herbert J. Deany
Robert S. Kirby
William F. Bunn
Attorneys for Defendant Appellant
135 East Eleventh Place
Chicago 5, Illinois
WAbash 2-4811

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Designation of Record

To the Clerk of the United States District Court for
271 the Northern District of Illinois, Eastern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, defendant-appellant designates the following portions of the record to be contained in the record on appeal in the above-entitled action to the United States Court of Appeals for the Seventh Circuit:

1. Complaint.
2. Defendant's answer to complaint.
3. Transcript of all of the testimony offered on behalf of plaintiff and defendant, a copy of which is filed herewith.
4. All stipulations of the parties which were read into the record on the trial.
5. Defendant's general motion for a directed verdict of not guilty and separate motions for a directed verdict for defendant as to the four respective charges in the complaint, presented and filed by defendant at the close of all the evidence offered on behalf of plaintiff.
6. Order of February 21, 1955, overruling defendant's
272 motions for a directed verdict as to the four respective charges, entered at the close of all the evidence offered on behalf of plaintiff.
7. Defendant's general motion for a directed verdict of not guilty and separate motion for a directed verdict as to paragraph 6(a) of the complaint presented and filed by defendant at the close of all the evidence offered on behalf of both parties.
8. Order of February 23, 1955, overruling defendant's general motion for a directed verdict and separate motion for a directed verdict as to paragraph 6(a) of the complaint, entered at the close of all the evidence offered on behalf of both parties.
9. Transcript of argument of counsel and rulings of the court on defendant's motions presented at the close of plaintiff's evidence.

10. Transcript of argument of counsel and rulings of the court on defendant's motions presented at the close of all the evidence offered on behalf of both parties.
11. Certificate of court reporter.
12. Plaintiff's Exhibits 1 and 2.
13. Defendant's Exhibits 1 through 4, inclusive.
14. Instructions to the jury.
15. Transcript of argument of defendant's counsel on its objections to instructions tendered by plaintiff and given by the court.
16. Verdict of the jury filed February 23, 1955.
17. Judgment on the verdict entered February 23, 1955.
18. Motion of defendant for judgment in its favor, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure or, in the alternative, for a new trial, filed March 4, 1955.
19. Order of March 14, 1955, denying defeendant's motion for judgment in its favor and its motion, in the alternative, for a new trial.
20. Notice of appeal filed April 7, 1955.
21. Certificate of mailing notice of appeal.
22. Order approving supersedeas bond in the amount of $17,000.
23. Supersedeas bond filed.
24. Statement of points on which defendant-appellant intends to rely.
25. This designation.
26. All notices given, motions made and orders entered after the date of the filing hereof.

Herbert J. Deany
Robert S. Kirby
William F. Bunn
Attorneys for Defendant-Appellant
135 East Eleventh Place
Chicago 5, Illinois
Telephone: WAbash 2-4811

Received a copy of the above and foregoing designation of record together with a copy of the statement of points on which defendant-appellant intends to rely, this 18th day of April, A.D. 1955.

(Signed) Robert Rafferty
Attorneys for Plaintiff-Appellee
30 North LaSalle Street
Chicago, Illinois

And on the same day to wit, the 18th day of April,
274 1955 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Notice Re Filing Of Supersedeas Bond in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 53 C 1687)

Notice

To: Robert J. Rafferty
Attorney for Plaintiff Appellee
30 North LaSalle Street
Chicago 2, Illinois

Pursuant to the local rules of civil procedure of the
275 United States District Court for the Northern District of Illinois, Eastern Division, this notice is being served upon you to advise you that on Friday, April 15, 1955, the Illinois Central Railroad Company, Defendant Appellant, filed with the Clerk of the aforementioned court a Supersedeas Bond in the amount of $17,000.00, a copy of which has been heretofore served upon you.

Illinois Central Railroad Company
H. J. Deany
R. S. Kirby
W. F. Bunn
Attorneys for Defendant Appellant
135 East Eleventh Place
Chicago 5, Illinois
WAbash 2-4811

Received a copy of the foregoing notice this 18th day of April, 1955.

(Signed) Robert Rafferty
Attorney for Plaintiff Appellee

And afterwards on, to wit, the 25th day of April,
276 1955 came the Plaintiff-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Record in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 53 C 1687)

Designation of Record by Plaintiff-Appellee

277 To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, plaintiff-appellee designates the following portions of the record to be contained in the record on appeal in the above entitled action to the United States Court of Appeals for the Seventh Circuit:

1. Transcript of opening statement to the jury by counsel for defendant-appellant.
2. Entry of appearance of plaintiff-appellee on appeal.
3. This designation.

(Signed) Robert Rafferty
Attorney for Plaintiff-Appellee
30 North LaSalle Street
Chicago 2, Illinois
RAndolph 6-1892

State of Illinois }
County of Cook } ss

Robert J. Rafferty, being first duly sworn on oath,
278 deposes and says that he served a copy of the above and foregoing designation of record upon Herbert J. Deany, Robert S. Kirby and William F. Bunn, attorneys for defendant-appellant, by mailing a copy thereof to said attorneys in a correctly addressed, sealed, postage fully pre-paid envelope, which envelope with enclosure was deposited in the United States Mail on April 25, 1955.

(Signed) Robert J. Rafferty

Subscribed and Sworn to before me
this 25th day of April, 1955.
Mary Conrad, *Notary Public.*

And afterwards on, to wit, the 10th day of May,
279 1955 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Stipulation

It is stipulated between the parties herein that the
280 original exhibits introduced on the trial of this cause may be transmitted to the Court of Appeals, in lieu of the reproduction of the said exhibits as a part of the printed record on appeal.

Plaintiff's exhibit 1 is a schedule of pay increases identified on page 65 and admitted on pages 149 and 162; plaintiff's exhibit 2 is a statement of the plaintiff identified on page 106 and admitted on page 107.

Defendant's exhibit 1 is a photograph identified and admitted on page 70; defendant's exhibits 2, 3, and 4 are hospital and doctor bills identified and admitted on page 147.

Said exhibits shall be transmitted by the clerk of this court to the Court of Appeals for the Seventh Circuit, with the record on appeal in this cause, and when the appeal in this cause has been heard and determined, said
281 exhibits shall be returned to the clerk of this court by the clerk of the Court of Appeals, Seventh Circuit.

Dated May ....., 1955.

(Signed) Robert Rafferty
Attorney for Plaintiff-Appellee
(Signed) William F. Bunn
Attorneys for Defendant Appellant

Approved:
United States District Judge

And on the same day to wit, on the 10th day of May,
282 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Order

It appearing to the court from the nature and
283 character of the exhibits in this cause that the original of said exhibits should be transmitted to the United

States Court of Appeals for the Seventh Circuit as a part of the record on appeal herein, it is ordered, in accordance with the stipulation of the above-named parties, that the clerk of the above-entitled court be and he is hereby authorized and directed to withdraw from the files in his office and to transmit to the clerk of said Appellate Court with and as a part of the record on appeal in said cause all said original exhibits, and said original exhibits need not be copied in the said record on appeal.

The above stipulation of the parties is all other respects confirmed and approved and in accordance with said stipulation it is so ordered.

Enter:

(Signed) Philip L. Sullivan
United States District Judge

Dated May 10th, 1955.

Northern District of Illinois }
United States of America } ss:

I, Roy H. Johnson, Clerk of the United States Dis-
284 trict Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: *John W. Webb*, Plaintiff, v. *Illinois Central Railroad Company, a corporation*, Defendant, No. 53 C 1687, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of May, 1955.

(Signed) Roy H. Johnson
Clerk

(Signed) By Gizella Butcher
Deputy Clerk

[fol. 285] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM AND SESSION, 1955

No. 11462

JOHN W. WEBB, Plaintiff-Appellee,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

OPINION—December 29, 1955

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, Circuit Judge. This is an action under the Federal Employer's Liability Act, 45 U. S. C. §§ 51 *et seq.*, to recover damages for personal injuries sustained by plaintiff in the course of his employment as a brakeman by defendant, resulting, as he averred, from the negligence of defendant in failing to provide him with a reasonably safe place in which to work. Defendant's motions for a directed verdict made at the close of plaintiff's evidence and at the close of all the evidence were denied, as was its alternative motion for a new trial. It appeals from the judgment entered on the verdict in favor of plaintiff, assigning as error the trial court's action in overruling its motions and in giving certain instructions.

Plaintiff had been employed by defendant in various capacities since about 1925 and was, on July 2, 1952, when the accident occurred, working as a brakeman, being assigned to the crew of a local freight run between the cities of East St. Louis and Clinton, Illinois. During the course of his duties, in a switching operation at Mount Olive, he noticed that a wheat car in the train was leaking. While the other crew members continued with the task of picking [fol. 286] up cars to be incorporated into the train, he started back to the caboose to get some waste to plug the hole in the leaking car. He turned and, on the first step he took, tripped and fell with his left leg buckled under him. He thereby sustained a serious injury to his left kneecap.

The accident occurred on the roadbed of defendant's "house track" at a point about one foot from the end of the ties. After plaintiff fell, he looked to see what had caused him to fall and saw a clinker "about the size of my fist" which was partly out of the ground, and a hole beside the clinker. He picked up the offending object and tossed it aside, proceded to the caboose, procured some waste and plugged the hole in the leaking car. Plaintiff stated that he looked "at the ground" before he stepped but did not see the clinker. He stated further that the footing on the roadbed looked level but was a little soft.

The principal question presented is whether the court correctly ruled that there was sufficient evidence of negligence to require denial of defendant's motions for a directed verdict and submission of the cause to a jury.

Plaintiff's testimony that his injury was caused by his stepping on a clinker is not contradicted. We shall assume, for the purpose of this decision, that such an object on or in the roadbed constituted a hazard to defendant's employees. But to prevail, it was incumbent on plaintiff to adduce evidence that this hazardous condition was produced or was permitted to continue by reason of defendant's negligence. *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U. S. 573; *Eckenrode* v. *Pennsylvania R. Co.*, 164 F. 2d 996, aff'd 335 U. S. 329 (C. A. 3); *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7; *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658. Fault or negligence may not be inferred from the mere existence of the clinker and the happening of the accident. *Delaware, L. & W. R. Co.* v. *Koske*, *supra*; *Patton* v. *Texas & P. Ry. Co.*, *supra*. The employer is not an insurer that the work place be absolutely safe, but is chargeable only with the duty of exercising reasonable care and diligence to see that the place where work is to be performed is reasonably safe for its workmen. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492; *Delaware, L. & W. R. Co.* v. *Koske*, *supra*; *Patton* v. *Texas & P. Ry. Co.*, *supra*.

Applying these governing principles, we believe the trial court erred in denying defendant's motions for a directed [Vol. 287] verdict. The evidence, viewed in the light most favorable to plaintiff, supports the following fact statement. He sustained a serious injury when he stumbled over

an unusually large clinker which was embedded, partially at least, in defendant's roadbed. At the point where the accident occurred defendant maintains its mainline track which runs in a north-south direction. Parallel to, and east of, that track, defendant maintains a second track which is referred to in the record as the passing track. The latter is connected to the mainline by switches and a cross-over track. Ingress to the passing track is gained over a switch, known as the "house track" switch. The section of the passing track south of the switch is known as the house track. East of these installations, and connected thereto by switches and a cross-over track, are certain facilities of the L. & N. Railroad consisting of its mainline and house tracks. Plaintiff was standing on the roadbed of defendant's house track approximately twenty feet south of the switch when he noticed the leaking condition of the wheat car. The accident occurred at that spot when he turned toward the caboose and took one step. He was regularly employed on the East Saint Louis-Clinton local and worked frequently at this locale. He did not see the clinker before he fell; during cross-examination of plaintiff, the trial judge characterized his testimony as to his knowledge whether, before the accident, the clinker was completely buried in the roadbed in the following language, "It is self-evident that he does not know, if he did not see it." The physical set-up of defendant's house track had been altered in June, 1952, when the level of the house track switch had been raised five inches. In this operation the ties and rails were raised and sufficient ballast in the form of fine cinders and crushed stone was employed to raise the switch to the required level and the grade of the connecting rails to a compensating elevation. There was no direct testimony that this operation affected the roadbed at the point where the accident occurred; *i.e.*, twenty feet south of the switch, but, for purposes of this opinion, we assume that it was affected. Some fifteen cubic yards of ballast were required to accomplish the end result. Further weight is afforded to our assumption by plaintiff's testimony that the footing at that place was level but a little soft. Three different employees testified that they periodically inspected the trackage at this location for defects in the facilities and

[fol. 288] hazards existing thereon or nearby. One of these witnesses testified that he had, occasionally, discovered large clinkers in the ballast in his territory and had caused them to be removed. Subsequent questioning of the witness elicited the testimony that the "territory" to which reference is made included more than forty miles of defendant's right of way and mainline. There was no testimony as to conditions at the scene of the accident either before or after the occurrence except plaintiff's testimony that he stumbled over an unusually large clinker which caused his injury.

To make a submissible case it was incumbent on plaintiff to adduce substantial evidence that defendant either negligently placed the clinker in the ballast or was chargeable with notice, either actual or constructive, of its presence therein. *Bevan* v. *New York, C. & St. L. R. Co.*, 132 Ohio St, 245, 6 N. E. 2d 982. We think his proof fails in this respect. There is no evidence as to the agency whereby the hazard was placed in or on the roadbed. Defendant's lines are in close proximity to and are connected with those of the L. & N. Plaintiff testified that the facilities of the two roads were connected to permit the interchange of freight cars between them. A photographic exhibit which, according to plaintiff's testimony, substantially represents the conditions at the scene of the accident, reveals several buildings in the near vicinity; there is no evidence to show whether these are the property of defendant or of the L. & N. or of some other stranger to the occurrence. The right of way is not fenced, and is, therefore, accessible to the public; there is no evidence as to whether or not the premises are frequented by strangers. There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation.

Furthermore, were we to hold that it was proper to permit the jury so to speculate, plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence per se to allow such an object to become mixed in with the fine ballast used in improving its roadbed. Defendant's duty to plaintiff in this respect

was to exercise the care of a reasonably prudent person, [fol. 289] under the existing circumstances, to prohibit the introduction of a hazard into the roadbed where plaintiff was required to work. Cf. *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492; *Missouri Pacific R. Co.* v. *Zolliecoffer*, 191 S. W. 2d 587, 588 (Ark.). Not only is there no evidence that defendant violated that duty, but also, there is a total want of evidence as to what constitutes reasonable prudence under the proved circumstances.

The record is equally lacking in evidence to prove that defendant had actual or constructive notice of the dangerous condition. The testimony as to actual notice is that no one, plaintiff included, knew of the presence of the clinker until the accident occurred. There is substantial undisputed evidence that this portion of defendant's right of way was inspected frequently, with a purpose which included the seeking out and removal of such hazards. The evidence is silent as to what standard of care plaintiff was entitled to expect and to rely upon. There is no evidence that defendant was remiss in any respect. There is no proof that its inspection of its premises did not meet the required standard, or that a closer, more thorough, inspection would have disclosed the existence of this hazardous situation.

Plaintiff having failed in his burden of proof, it was error to submit the case to the jury and permit it to reach a verdict by pure speculation. The situation is not unlike that disclosed in *Kaminski* v. *Chicago River & I. R. Co.*, 200 F. 2d 1 (C. A.-7). Kaminski, while working in the course of his employment on the premises of a customer of the defendant railroad, was seriously injured when he fell into a hole beside an industry track. We found that there was no evidence as to when and through what agency the hazardous condition was created or as to the railroad's notice, either actual or constructive, of its existence, and held that the trial court erred in overruling the railroad's motion for a directed verdict. A comparable holding is found in numerous cases involving factually similar situations. See *e.g.*, *O'Mara* v. *Pennsylvania R. Co.*, 95 F. 2d 762 (C. A.-6); *Bevan* v. *New York, C. & St. L. R. Co.*, 132 Ohio St. 245, 6 N. E. 2d 982; *Spencer* v. *Atchison, T. & S. F. Ry. Co.*, 207 P. 2d 126 (Cal. App); *Waller* v *Northern*

Pacific Terminal Co., 166 P. 2d 488 (Ore.), *Matthews* v. *Southern Pacific Co.*, 59 P. 2d 220 (Cal. App.).

The cases on which plaintiff relies are largely inapposite. [fol. 290] In each there was evidence from which the jury might reasonably infer that the defendant either negligently created the dangerous agency involved, or was chargeable with notice of the existence of a condition which rendered unsafe the place where the injured employee was required to work. *Eg., Brown* v. *Western Ry. of Alabama*, 338 U. S. 294; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, aff'ing, 16 Ga. App. 551, 85 S. E. 809; *Fleming* v. *Kellett*, 167 F. 2d 263 (C. A.-10); *Waddell* v. *Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. A.-7); *Pitcairn* v. *Hunault*, 86 F. 2d 664 (C. A.-7); *Virginian Ry. Co.* v. *Staton*, 84 F. 2d 133 (C. A.-4); *Smith* v. *Schumaker*, 85 P. 2d 967, cert. denied 307 U. S. 646 (Cal. App.); *Missouri Pacific R. Co.* v. *Zolliecoffer*, 191 S. W. 2d 587 (Ark.); *Tash* v. *St. Louis-S. F. Ry. Co.*, 76 S. W. 2d 690 (Mo.); *McClain* v. *Charleston & W. C. Ry. Co.*, 4 S. E. E. 2d 280 (S. C.); *Lock* v. *Chicago, B. & Q. R. Co.*, 219 S. W. 919 (Mo.); *Holloway* v. *Missouri, K. & T. Ry. Co.*, 208 S. W. 27 (Mo.). The only case cited which purports to justify an inference of negligence merely from the existence of an obstruction and the happening of the accident is *Marcades* v. *New Orleans Terminal Co.*, 111 F. Supp. 650. The case was tried by the court without a jury and the evidence is not reported. Insofar, however, as that decision imposes liability merely because of the existence of a hazard without any evidence as to defendant's notice, it rests upon a theory of liability without fault and cannot be reconciled with pronouncements by the Supreme Court that the Act does not make railroads insurers of employee safety. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492.

Since we are of the opinion that defendant's motions for a directed verdict should have been allowed, we find it unnecessary to consider other assignments of error. The judgment is reversed and the cause remanded to the District Court with directions to enter judgment for defendant.

[fol. 291] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Hon. J. Earl Major, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge, Hon. H. Nathan Swaim, Circuit Judge.

No. 11462

JOHN W. WEBB, Plaintiff-Appellee

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JUDGMENT—December 29, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby remanded to the said District Court with directions to enter judgment for the Defendant.

[fol. 292] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—January 30, 1956

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

[fol. 293] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 294] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI. Filed April 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9137-1)